(24,139)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 116.

THE BI-METALLIC INVESTMENT COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE BOARD OF EQUALIZATION, AND ELIAS M. AMMONS, JAMES B. PEARCE, M. A. LEDDY, ROADY KENEHAN, AND FRED FARRAR, AS MEMBERS, &c., ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

INDEX.

	Original.	Print
Caption	1	1
Transcript of record from the district court of the city and county of Denver	2	1
Caption	2	1
Complaint	4	2
Order transferring cause to division one	15½	8
Demurrer	16	9
Answer and cross-bill	17	10
Motion to strike answer and cross-bill	31	19
Demurrer to answer and cross-bill	33	20
Separate answer to cross-bill by Clair J. Pitcher	35	21
Stipulation amending complaint	56	33
Demurrer to answer of Clair J. Pitcher	58	34
Order sustaining demurrer to answer and cross-bill	59	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1915.

	Original.	Print
Order granting leave to withdraw motion to strike cross-bill against defendant Pitcher	60	35
Order overruling defendant Pitcher's demurrer to complaint	60	35
Order overruling demurrer of State Board of Equalization *et al.* to answer of defendant Pitcher	61	36
Order granting injunction	61	36
Order denying prayer for mandamus against Clair J. Pitcher	61	36
Order overruling demurrer to complaint, etc.	62	37
Judgment	62½	37
Order staying execution	64	39
Clerk's certificate	65	39
Assignment of errors	66	40
Stipulation as to argument and submission	68	41
Judgment	70	42
Opinion, White, J.	72	43
Opinion, White, J., in original mandamus proceeding entitled The People of the State of Colorado *ex rel.* The State Board of Equalization *et al. vs.* Clair J. Pitcher, commissioner, etc.	76	45
Dissenting opinion, Hill, J.	115	69
Dissenting opinion, Gabbert, J.	156	96
Dissenting opinion, Garrigues, J.	161	99
Petition for rehearing	165	101
Order denying petition for rehearing	170	104
Opinion on petition for rehearing, Hill, J.	171	104
Opinion on petition for rehearing, Gabbert, J.	172	105
Assignment of errors	173	106
Petition for a writ of error	177	109
Order allowing writ of error	182	112
Bond on writ of error	183	112
Order allowing writ of error	186	113
Writ of error	188	114
Clerk's return to writ of error	190	115
Citation and service	191	115
Order approving bond	192	116
Certificate of lodgment	193	117
Clerk's certificate	194	117

1 STATE OF COLORADO, *ss:*

Pleas in the Supreme Court of the State of Colorado at a term thereof begun and held at its court room in Denver, in said State, on the second Monday (it being the 8th day) of September, A. D. 1913.

Present:

Hon. George W. Musser, Chief Justice.
Hon. Wm. H. Gabbert,
Hon. S. Harrison White,
Hon. Wm. A. Hill,
Hon. James E. Garrigues,
Hon. Tully Scott,
Hon. Morton S. Bailey,
Associate Justices.

Be it remembered that heretofore, and on to-wit, the 15th day of November, A. D. 1913, there was filed in our said Supreme Court the following transcript of record in words and figures as follows, to-wit:

2 56520.

District Court, City and County of Denver, Second Judicial District.

STATE OF COLORADO,
City and County of Denver, ss:

Pleas in the District Court of the City and County of Denver, State of Colorado, in the First Division thereof, before the Hon. Geo. W. Allen, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House, in Denver, in said County, on the second Tuesday (it being the 9th day) of September, A. D. One Thousand Nine Hundred and Thirteen.

Present:

Hon. Geo. W. Allen, one of the Judges of the District Court.
John A. Rush, Esq., District Attorney of said District.
Alexander Nisbet, Esq., Commissioner of Safety, Ex-officio Sheriff of said County.
J. Sherman Brown, Esq., Clerk of said Court.

8208. Filed in Supreme Court Nov. 15, 1913. James R. Killian, Clerk.

3 No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corp., etc.,
vs.
CLAIR J. PITCHER, etc., et al.

Be it remembered, that heretofore and on to-wit the 28th day of October A. D. 1913, came the plaintiff by its attorneys, Benedict & Phelps, Esquires, and filed herein its Complaint.

And said Complaint is in words and figures as follows, to-wit:—

4 Filed in District Court, City & County of Denver, Colo., Oct. 28, 1913. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. 2.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Sueing in Its Own Behalf and on Behalf of All Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, a Municipal Corporation; The State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar, as the Members of the State Board of Equalization; The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link, as Members of the Colorado Tax Commission, Defendants.

Complaint.

Injunction.

Comes now the said plaintiff, by Benedict & Phelps, its attorneys, and complaining of the said defendants, for cause of action alleges:

That the plaintiff is and at all times hereinafter mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, having its principal
5 place of business in the City and County of Denver, in said State, and that plaintiff is and at all times hereinafter mentioned has been a taxpayer in and of the City and County of Denver aforesaid and brings this action in its own behalf and in behalf of all others similarly situated who shall join herein and contribute to the costs of this action. That the defendant the State Board of

Equalization, is a board or body existing by virtue of the Constitution and the Statutes of the State of Colorado, and that defendants Elias M. Ammons, James B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar, are the members of said State Board of Equalization, and were the members thereof at the time of all the proceedings of said Board hereinafter referred to. That the defendant The Colorado Tax Commission is an alleged or pretended board or body existing by virtue of an alleged and pretended Statute of the State of Colorado. That the defendants John B. Phillips, J. Frank Adams, and Celsus P. Link, are the members of said so-called Colorado Tax Commission and have been such members at all times during the proceedings of said so-called commission hereinafter referred to. That the defendant Clair J. Pitcher is and at the times hereinafter mentioned since to-wit, June 1st, 1913, has been Commissioner of Finance of the City and County of Denver, a municipal corporation duly organized and existing under and by virtue of Article 20 of the Constitution of the State of Colorado and the Charter of said City and County of Denver, adopted pursuant thereto, and as such is Ex-officio Assessor of the said City and County of Denver and is the officer in whom are vested and by whom are performed the duties of assessor within and for the City and County of Denver, and is designated by the Charter of said City and
6 County of Denver to perform the duties of such assessor.

That said plaintiff is and at all time- hereinafter mentioned has been the owner in fee simple and in possession of the following described real property situate, lying and being in the City and County of Denver, aforesaid, to-wit, Lots numbered twenty-four (24) to thirty-two (32), both inclusive, in Block numbered ninety-eight (98), East Denver, together with the improvements thereon situate, consisting chiefly of a store office and theatre building commonly known and designated as the Tabor Opera House Block.

That heretofore and prior to the first day of August, A. D. 1913, the said defendant Pitcher, acting in his capacity as assessor of and for the City and County of Denver, did, in pursuance of the provisions of the Statute of the State of Colorado in such cases, make and cause to be made an assessment of the real and personal property located within the City and County of Denver aforesaid, and did so make and cause to be made the said assessment of all of the said real and personal property within the City and County of Denver aforesaid upon the basis of the full cash value. That in the making of the said assessment the said Pitcher, as such assessor, placed upon the real property of this plaintiff hereinbefore described, and upon the improvements thereon situate, a total valuation of $802,000. That the said valuation of $802,000 is and was at the time of the making thereof largely in excess of the full cash value of such property, and largely in excess of the amount for which the said property could be sold at public sale to any person ready and willing to purchase the same; but notwithstanding the excessive valuation
7 so placed upon said property by the said defendant Pitcher, acting as assessor as aforesaid, said assessor did refuse and still refuses to change the valuation thereof or to reduce the same,

and included the said valuation in his assessed valuations of the real and personal property located in said City and County of Denver.

That thereafter and in the manner and within the time required by statute the said defendant Pitcher, acting as assessor as aforesaid, subscribed and swore to and produced his abstract of his assessment roll showing the total and aggregate valuation of the real and personal property of the City and County of Denver as assessed by him as assessor, to be the sum of $254,755,220 which said abstract of assessment was transmitted by said assessor to the defendant The Colorado Tax Commision on or before the first Monday of September, 1913.

That the various assessors of all the Counties of the State of Colorado did likewise file with the said Colorado Tax Commission abstracts of the assessments in the said various counties and that the total valuation of all real and personal property in the State of Colorado as shown by the abstracts of assessments of the said several assessors, was the sum of $859,743,039. That the defendant the Colorado Tax Commission did, after receiving the abstracts of the assessments from the various assessors in all of the counties of the State of Colorado, hold meetings, from time to time, and did assume and pretend to examine into said abstracts of assessment and to consider the valuations of the real and personal property of the several counties of the State and to determine whether the said prop-
8 erty had been by the various assessors of the State assessed at its true and full cash value, and did thereafter assume and pretend to find, ascertain and determine that the valuation of all of the taxable property in the State of Colorado was in excess of the aggregate amount shown by the said various abstracts of assessment and that the total value of all taxable property in said State subject to taxation by the assessors of the several counties thereof, was the sum of $1,046,294,697, being $186,551,658 in excess of the aggregate of the amounts shown by the said abstracts of assessment from all of the counties of said state. And the said defendant The Colorado Tax Commission did further assume and pretend to find, ascertain and determine that the total valuation shown by the abstract of the assessment made by the said defendant Pitcher was erroneous and improper and was less than the full cash value of all of the taxable property in said City and County of Denver to be by him assessed, and did as-ume and pretend to find, ascertain and determine that the total valuation of the real and personal property in said City and County of Denver subject to assessment by the assessor was and is the sum of $356,657,308, or $101,902,088 in excess of the total valuation thereof as fixed by the said Pitcher acting as assessor as aforesaid. That thereafter and on or about the 6th day of October, A. D. 1913, the so-called findings and determinations of the defendant The Colorado Tax Commission, were transmitted by said defendant The Colorado Tax Commission to defendant the State Board of Equalization, and received by defendant The State Board of Equalization. That on Monday, October 6, 1913, the said defendant the State Board of Equalization met at the State Capitol in Den-
9 ver, Colorado, as provided by statute, and continued in session from time to time, and from day to day, until the 20th day

of October, A. D. 1913. That on to-wit, the said 20th day of October, A. D. 1913, said defendant the State Board of Equalization, acting in that behalf, upon the recommendation of The Colorado Tax Commission aforesaid, did assume and pretend to pass a certain resolution wherein and whereby the said defendant the State Board of Equalization assumed to increase the valuation of the taxable property in many of the counties of the State of Colorado as shown by the abstracts of assessment returned to the various assessors in that behalf, and thereby to increase the total value of all of the taxable property in the State subject to assessment by the assessors, from the sum of $859,743,039 to the sum of $1,046,294,697, making a total increase of $186,551,658, in the total valuation of taxable property subject to assessment by the County Assessors of the said state, and among other increases so attempted to be made by the said State Board of Equalization was an increase in the valuation of the real and personal property subject to assessment by the assessor in the City and County of Denver from the sum of $254,755,220 to the sum of $356,657,308, making an increase in the valuation of the property in the City and County of Denver subject to valuation by the assessor, of $101,902,088, the rate per cent of said increase being forty (40) per cent. That thereafter and on or about the 22nd day of October, A. D. 1913, said State Board of Equalization did notify said defendant Pitcher of the said alleged and pretended increase in the valuation of the real and personal property subject to taxation in the City and County of Denver, and did order and direct the said Pitcher, acting as assessor, to add the above increase in valuation to his assessed valuation of the real and personal property subject to taxation by him in said City and County of Denver, thereby seeking to require and coerce the said Pitcher, acting in his capacity as assessor, to arbitrarily and unreasonably increase the valuation of all taxable property in the City and County of Denver forty (40) per cent over the full cash value thereof as theretofore fixed and determined by said defendant Pitcher acting as assessor.

That the said defendant Pitcher will, if there- required and coerced by the said State Board of Equalization, or the said The Colorado Tax Commission, comply with the demand to increase the assessed valuations in said City and County of Denver, and will make a horizontal increase in the valuation of all taxable property in said City and County of Denver subject to assessment by him amounting to forty (40) per cent, and will increase the value of the property of this plaintiff hereinabove described from the sum of $802,000 to the sum of $1,122,800, without notice to this plaintiff, and without opportunity for this plaintiff to be heard, whereby the valuation of the property of this plaintiff for purposes of taxation will be fixed at not less than $500,000 in excess of the real and full cash value thereof.

And plaintiff further avers that the action of said The Colorado Tax Commission as hereinabove set forth, was and is illegal, null and void. That the said defendant The Colorado Tax Commission did assume and pretend to raise the assessed valuation of all real and personal property in the City and County of Denver, including the property of this plaintiff as aforesaid, without giving any notice to

this plaintiff of any such proposed raising of the assessed
11 valuation thereof, without fixing any time or place for a hearing of said matter, and without giving any opportunity whatever to this plaintiff and others similarly situated to be heard.

And plaintiff further avers that the said defendant The Colorado Tax Commission, is wholly without power or authority to make any raise or increase in the valuation of the property of this plaintiff situate in the City and County of Denver, aforesaid, or the properties of other persons in like situation. That the attempt of the said The Colorado Tax Commission so to do was and is null and void and of no force or effect, and that the purported and pretended action of the said The Colorado Tax Commission as hereinabove set forth, was and is an attempt to deprive this plaintiff and others in like situation of their property without due process of law, and in violation of the provisions of the 14th amendment to the Constitution of the United States and of the provisions of Section 25 of Article 2 of the Constitution of the State of Colorado. That the action of The State Board of Equalization was likewise done and had without notice to this plaintiff and others similarly situated and without opportunity to this plaintiff and others in like situation to be heard, and was in excess of the power and authority conferred by law upon the said State Board of Equalization, and in violation of the powers and duties of said Board. That said Board is without power or authority to increase the total valuation of the taxable property of the State as shown by the abstracts of assessment of the assessors of the several counties, and the purported and pre-
12 tended action of said Board in increasing the aggregate of said valuation was and is null and void and of no force, virtue or effect. That by the action of said State Board of Equalization this plaintiff and others in like situation were denied the right or opportunity to be heard, and the effect of said action, unless the same be prevented, will be to take the property of this plaintiff and others in like situation, without due process of law, in violation of the provisions of the 14th amendment to the Constitution of the United States, and in violation of the provisions of Section 25 of Article 2 of the Constitution of the State of Colorado.

That by the alleged and pretended action of the defendants The Colorado Tax Commission and the State Board of Equalization, it has been attempted by said boards to usurp the functions of the defendant Pitcher as the assessor of the City and County of Denver, and to substitute for the action of said assessor in performance of his duty the whim or caprice of the said defendants The Colorado Tax Commission and the State Board of Equalization.

That the action of said last named defendants and each of them as hereinabove set forth and contained, was and is wholly arbitrary, unreasonable and in violation of the law.

And plaintiff further alleges that the alleged and pretended act of the General Assembly of the State of Colorado approved June 2, 1911, by which it is claimed that the defendant The Colorado Tax Commission was created, was and is illegal, null and void, and was and is in violation of the provisions of Section 35 of Article 5 of the

Constitution of the State of Colorado and was and is an at-
13 tempt on the part of the General Assembly of the State of Colorado to delegate to a special commission, to-wit the so-called Colorado Tax Commission, power to levy taxes and to perform municipal functions contrary to the provisions of the said Section 35 of Article 5 of said Constitution.

That plaintiff is informed and verily believes that the said defendants The Colorado Tax Commission and the State Board of Equalization will, unless restrained therefrom, seek to compel the said defendant Pitcher, to carry out and perform the instructions and directions of the said State Board of Equalization, and to increase the valuation of all taxable property in the City and County of Denver, aforesaid, including the property of this plaintiff, to the extent of forty (40) per cent. and thereby this plaintiff and all property owners of the City and County of Denver will be precluded from securing any relief whatever from the County Board of Equalization of the City and County of Denver aforesaid. That the time for the sitting of said County Board of Equalization has long since expired, and the action of said State Board of Equalization and said Colorado Tax Commission in the premises will have the effect of denying all property owners of the City and County of Denver, including this plaintiff, all benefit of action by the County Board of Equalization in equalizing the value of properties within the said City and County of Denver, and of depriving said County Board of Equalization of the powers conferred upon it by Section 15 of Article X of the Constitution of the State of Colorado.

That plaintiff has no plain, speedy or adequate remedy at law in the matters and things herein complained of, and is remedi-
14 less in the premises, save by the interposition of a court of equity and the issuance of a writ of injunction to prevent the infliction of the wrongs herein complained of. That if plaintiff and others in like situation are subjected to the wrongs threatened as aforesaid, irreparable injury will result to them and each of them, including this plaintiff.

And plaintiff further avers that unless this Honorable Court shall cause a writ of injunction to be issued herein to prevent and restrain defendants from carrying out and effectuating the said increase in valuation of the assessable property in the City and County of Denver aforesaid, including the property of this plaintiff, a multiplicity of suits will result and the finances of the City and County of Denver aforesaid, as well as of the State of Colorado, will be thrown into inextricable confusion and chaos.

Wherefore, plaintiff prays that a temporary injunction issue herein enjoining and restraining the defendants and each of them and all persons acting under them or either of them, or by their authority or subject to their control, to absolutely refrain and desist from taking any steps whatever to enforce and carry out the said threatened increase in the assessed valuations of the property of this plaintiff and others in like situation, and that upon final hearing the said injunction be made permanent and that plaintiff do have and recover its costs herein, and have execution therefor; and for

such other and further relief in the premises as shall be proper and in accordance with equity and good conscience.

BENEDICT & PHELPS,
Attorneys for Plaintiff.

15 STATE OF COLORADO,
City and County of Denver, ss:

Horace W. Bennett, of lawful age, being first duly swprn, upon oath deposes and says:

That he is the President of the said plaintiff; that said plaintiff is a corporation; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief and as he verily believes.

HORACE W. BENNETT.

Subscribed and sworn to before me this 28th day of October, A. D. 1913.

My commission expires May 24th, 1915.

[SEAL.] RICHARD H. GODDARD,
Notary Public.

15½ And afterwards, and on to-wit the 29th day of October, A. D. 1913, the same being one of the regular juridical days of the September Term, 1913, of said court, the following proceedings, inter alia, were had and entered of record in said court, to-wit:

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corp., etc.,
vs.
CLAIR J. PITCHER, etc.

Injunction.

At this day come the parties hereto by their respective attorneys and on oral stipulation entered into in open court,

It is ordered by the Court that this cause be and the same hereby is transferred to Division One of this court.

16 And afterwards, and on to-wit the 30th day of October, A. D. 1913, came the defendant by his attorneys, I. N. Stevens and Geo. Q. Richmond, Esquires, and filed herein his Demurrer.

And said Demurrer is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Oct. 30, 1913. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. II.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of All Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, a Municipal Corporation; The State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Rhody Kenehan, and Fred Farrar, as the Members of the State Board of Equalization; The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link, as Members of the Colorado Tax Commission, Defendants.

Demurrer.

16½ Comes now the defendant Clair J. Pitcher, as Commissioner of Finance, and Ex-officio Assessor of the City and County of Denver, one of the above named defendants in the above entitled action, and demurs to the complaint herein,

And for cause of demurrer says:

First. That the said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Second. That the complaint does not state facts sufficient to warrant the Court in granting the relief prayed for in and by the said complaint.

I. N. STEVENS,
GEO. Q. RICHMOND,
Attorneys for Defendant Clair J. Pitcher, Commissioner of Finance and ex-Officio Assessor of the City and County of Denver.

And afterwards, and on to-wit the 5th day of November, A. D. 1913, came the defendants, with the exception of Clair J. Pitcher, by Fred Farrar, Attorney General and filed herein their Answer and Cross Bill.

And said Answer and Cross Bill is in words and figures as follows, to-wit:

17 Filed in District Court, City & County of Denver, Colo., Nov. 5, 1913. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. 2.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of All Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, a Municipal Corporation; The State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Rhody Kenehan, and Fred Farrar, as the Members of the State Board of Equalization; The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link, as Members of the Colorado Tax Commission, Defendants.

Answer and Cross Bill.

Come now all of the above named defendants, with the exception of Clair J. Pitcher, by Fred Farrar, Attorney General, and answering the complaint of plaintiff herein:

I.

Admit that the plaintiff herein is a corporation organized and existing under the laws of the State of Colorado, and that it has its principal place of business in the City and County of
18 Denver and that said plaintiff has been a taxpayer in said City and County of Denver during the times alleged in the complaint.

Admit that the defendant, The State Board of Equalization is a board or body existing by virtue of the constitution and the statutes of the State of Colorado, and that Elias M. Ammons, James B. Pearce, M. A. Leddy, Rhody Kenehan and Fred Farrar are the members of said State Board of Equalization and were the members of said board at the time mentioned in the complaint.

Admit and allege that the defendant The Colorado Tax Commission is a board or body existing by virtue of the statutes of the State of Colorado, but deny that said Tax Commission is a pretended board or body, and deny that the statute or statutes referred to are pretended statutes, and on the contrary, allege that said Board is a commission designated and known as The Colorado Tax Commission; that the said commission was created by the laws of the State of Colorado, and is authorized to bring, in its own name,

such suits or actions, either in law or equity, as are necessary to enforce the laws of the State of Colorado for the assessment, levying and collection of taxes and for the supervision of the taxing functions of the State by the various officers of the various counties in the State. Admit that the defendants, John B. Phillips, J. Frank Adams and Celsus P. Link, are the members of said Colorado Tax Commission and have been during the time mentioned in the complaint.

Admit that the defendant Pitcher is the Commissioner of Finance of the City and County of Denver, and as such, ex-officio Assessor of said City and County.

Admit that the plaintiff is the owner of the property referred to in said complaint.

18½ II.

Admit that the said defendant Pitcher, prior to the first of August, 1913, caused to be made, an assessment of the real and personal property located within the City and County aforesaid, but deny that said Pitcher made his assessment upon said real and personal property upon the basis of the full cash value thereof, but on the contrary, allege that the assessment made by Pitcher of said real and personal property was at least forty per cent below its real cash value; admit that the assessment placed by said Pitcher on the property described of the plaintiff herein was $802,000.00; but allege that the plaintiff did not object before the assessor to said assessment; allege that the plaintiff took no appeal from the action of said assessor; allege that plaintiff did not protest to the commissioners of the City and County of Denver, sitting as a county board of equalization, against said assessment; and allege that the plaintiff did not protest to the State Board of Equalization against the increase of the valuation of property within the City and County of Denver; and that as to whether or not said Pitcher, acting as Assessor of said City and County, refused, or whether he still refuses to change the valuation placed upon said property by himself, these defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief. Admit that said Pitcher subscribed and swore to and produced an abstract of his assessment roll to The Colorado Tax Commission which showed an aggregate assessment as made by him of $254,755,220.00, and that said abstract was transmitted to said Tax Commission on or before the first Monday of September,
19 1913. And defendants admit that the various assessors of the counties of the state filed with the Colorado Tax Commission their abstracts of assessment; also admit that the Colorado Tax Commission after receiving said abstracts of assessment, held meetings from time to time and that it assumed to and did examine all of said abstracts of assessment so submitted and that said commission considered the valuations of said real and personal property of the several counties of the state for the purpose of determining whether said property had been by the various assessors of the state assessed at its true and full cash value, and after said examina-

tion, determined that the total value of all taxable property in said state subject to assessment by the assessors was in the sum of $1,046,294,697.00; and admit that said commission found that the assessment by Pitcher was erroneous and improper and was less than the full cash value of all the taxable property in the City and County of Denver assessed by him; admit that on or about the 6th day of October, said Tax Commission transmitted its findings and determination to the State Board of Equalization and admit that said statement showing said findings and determination was received by said board of October 6, 1913; admit that the State Board of Equalization met as alleged in the complaint on the 6th day of October and continued in session from day to day until the 20th of October; admit that during its varions sessions it had before it the recommendation of the Colorado Tax Commission and admit that it adopted a certain resolution whereby it increased the valuation of the taxable property in the various counties in a sum aggregating $186,551,658 and admit that it increased the valuation of the property assessed by said Pitcher
20 in the sum of $101,902,088, the rate per cent of said increase being 40%; admit that it notified said Pitcher of said raise, but deny that by said notification or by said action on the part of said State Board of Equalization or at all, it arbitrarily or unreasonably increased the valuation of the taxable property in the City and County of Denver forty per cent or any other per cent, or that it raised the valuation of said property in excess of the full cash value thereof.

III.

That as to the allegations contained in said complaint to the effect that the defendant Pitcher will, unless restrained by this court, increase the valuation of the taxable property of said City and County of Denver, subject to assessment, in a sum amounting to forty per cent, these defendants allege that they are informed and believe and so state the fact to be, that it is the intention of Pitcher not to increase the assessed valuation of the property of the City and County of Denver or the property of this plaintiff unless ordered to do so by the court.

IV.

That as to the allegations of the complaint to the effect that by action of said State Board of Equalization this plaintiff and others in like situation were denied the right or opportunity to be heard, etc., defendants allege that said plaintiff did have the right and opportunity to be heard before the County Board of Equalization and also had the right to be heard before the State Board of Equalization and such right was not denied it by the State Board of Equalization.

21 V.

Defendants deny that either the Colorado Tax Commission or the State Board of Equalization have attempted to usurp the functions of defendant Pitcher as Assessor of the City and County of Denver,

or to substitute for the action of said assessor in the performance of his duty the whim or caprice of said defendant boards or either of them, or that the action of said boards or either of them was arbitrary, or unreasonable or in violation of law.

VI.

That said complaint does not state facts sufficient to constitute a cause of action against the defendants or any or either of them.

For a further defense and as a cross bill against Defendant Clair J. Pitcher, these Defendants allege:

I.

That the above named defendant, The Colorado Tax Commission is a commission designated and known as The Colorado Tax Commission; that said commission was created by the laws of the State of Colorado and was and is authorized to bring in its own name such suits and actions in law or in equity as are necessary to enforce the laws of the State of Colorado for the assessment, levying and collection of taxes and for the supervision of the taxing functions of the state by the several officers of the various counties of the state.

II.

That the above named defendant, The State Board of
22 Equalization, is a board created by the constitution of the State of Colorado, consisting of the governor, secretary of state, treasurer, auditor and attorney general, and that all of its duties are prescribed by the constitution of the state and the laws of the general assembly of the state.

III.

That the City and County of Denver is a municipal corporation organized and existing under the laws of the State of Colorado, and that at all times herein mentioned the said City and County of Denver was organized and operated under Article 20 of the Constitution of the State of Colorado, and that said City and County of Denver constitutes one of the counties of the State of Colorado.

IV.

That the defendant herein, Clair J. Pitcher, was, during the year 1913 and up to the first day of June of said year, the duly elected, qualified and acting assessor of the City and County of Denver. That on or about the month of May, 1913, the people of the City and County of Denver adopted, at an election, what is known as the commission form of government and that at said election, the said Clair J. Pitcher was elected as Commissioner of Finance and took his office by virtue of said election on June 1, 1913, and qualified as such, and since the first day of June, 1913,said Pitcher has been acting both

as assessor and treasurer of the City and County of Denver and performing the duties pertaining to said offices.

V.

That during the year 1913 the above named defendant,
23 Clair J. Pitcher, acting in his capacity as assessor of the City and County of Denver, made an assessment of the real and personal property situated within his county, and within the time required by law, and that on or before the first of September, he made out an abstract of assessment in duplicate and transmitted one copy thereof to the Auditor of State and one copy thereof to the defendant herein, The Colorado Tax Commission; that said abstract of assessment so prepared and transmitted by said Pitcher, showed the aggregate value of the real and personal property situated and taxable within the said City and County of Denver and which had been assessed by him, said aggregate value being $254,755,220.

VI.

That all of the assessors of the various counties of the state on or before the first of September, 1913, transmitted to the Colorado Tax Commission their various abstracts showing the real and personal property assessed by them in their respective counties and the value thereof.

VII.

That the Colorado Tax Commission, after receiving the abstracts of the various assessors of the state as aforesaid, examined each and all of said abstracts for the purpose of determining whether the real and personal property of the several counties of the state had been assessed at its true and full cash value, and that after having examined all of said abstracts and after having secured information for the purpose of determining the true and full cash value of the real and personal property of the counties of the state, said com-
24 mission, on, to-wit, the 1st day of October, 1913, found and determined the amount of increase or decrease in the valuation of said real and personal property of the respective counties which would place said property on the assessment roll at its true cash value, and on said day issued an order to said Pitcher as assessor of the City and County of Denver, ordering and directing him to add to his valuation of property within said City and County of Denver the amount of $101,902,088 so found necessary to be added in order to place said property on the assessment roll at its full and true cash value; and that after said commission had determined upon the true value of the real and personal property of the several counties, it made a report of its actions and findings and transmitted the same to the State Board of Equalization, which said statement showed the amount to be added or deducted from the valuation of the real and personal property of each county, and which statement specified the amount to be added or to be deducted from the valuation of such real and personal property, and that

said commission in determining the valuation to be placed on the real and personal property of the various counties of the state proceeded in all respects according to the provisions of the law in such cases made and provided.

VIII.

That pursuant to and by authority of the Constitution and laws of the State of Colorado, the governor, secretary of state, treasurer, auditor and the attorney general of the State of Colorado, met on the first Monday of October, 1913, being October 6, 1913, and convened as the State Board of Equalization of the State of
25 Colorado at the executive office in the capitol building in the City and County of Denver; that said board met for the purpose, among other things, of examining the various assessments of the various counties of the state and for the purpose of equalizing said assessments in the various counties of the state and in such a manner as to secure a just valuation for the taxation of all property, real and personal, within the several counties of the state.

IX.

That said State Board of Equalization was duly adjourned from time to time and from day to day and met pursuant to said adjournment from time to time and from day to day at said executive office in said capitol building, until the business and duties of said board were duly and fully completed and discharged according to law, and until and including the 20th day of October, 1913.

X.

That on Monday, October 6, 1913, the statement of the Colorado Tax Commission as provided by Section 32, Chapter 216, Session Laws of 1913, was transmitted to and received by said Board of Equalization; and that thereafter and during the meeting of said State Board of Equalization as aforesaid, said board examined the abstracts of assessment as submitted to it by the Colorado Tax Commission, said abstracts comprising all the abstracts of the various assessors of the State of Colorado, considered said statement of the Colorado Tax Commission and heard all persons appearing before said Board of Equalization and desiring to be heard, either on behalf of themselves or on behalf of various counties; and being
26 fully advised by its consideration of said abstracts, statement and argument and by information obtained from other sources by the members of said Board, did determine the amount of increase or decrease in valuation to be placed on the real and personal property in each county; and having so determined, did, on, to-wit, the 20th day of October, while sitting as a Board of Equalization as aforesaid, make a record of its action on the abstract of each county of the State of Colorado and thereafter made a certificate of its action and transmitted the same to the various county assessors of the state, including therein a certificate to the respond-

ent herein, which last named certificate is in words and figures as follows, and is hereby made a part of this petition.

"DENVER, COLORADO, October 22, 1913.

Mr. Clair J. Pitcher, Assessor of Denver County, Denver, Colorado:

We, the undersigned, members of the State Board of Equalization, hereby certify:

That at a meeting of the State Board of Equalization, held on the 20th day of October, 1913, which meeting was held for the purpose of examining the abstracts of assessment of the various assessors of the State for the year 1913, as submitted to said Board by the Colorado Tax Commission, and for the purpose of taking action on said abstracts and of equalizing the valuation of the real and personal property of the counties of the State, as provided by law, and for the purpose of fixing the rate of tax to be levied and collected
26½ within the various counties of the State for State purposes, the following proceedings, among others, were had:

By resolution, duly adopted, the valuation of the real and personal property of the County of Denver was increased from $254,755,220 the amount returned in your abstract of assessment on property assessed by you, to $356,657,308, making an increase in valuation of your assessment of $101,902,088, the rate per cent of said increase being 40%.

And by resolution, duly adopted, the rate of tax which is to be levied and collected within the counties of the State for State purposes was fixed at 1.3 mills.

ELIAS M. AMMONS, *Governor;*
M. A. LEDDY, *State Treasurer;*
FRED FARRAR, *Attorney General;*
JAMES B. PEARCE, *Secretary of State;*
ROADY KENEHAN, *Auditor of State.*"

XI.

That on, to-wit, the 22nd day of October, 1913, the defendant herein, the Colorado Tax Commission, made the following order and transmitted the same to the defendant Pitcher herein:

"DENVER, COLORADO, October 22, 1913.

Mr. Clair J. Pitcher, Assessor of Denver County, Denver, Colorado.

DEAR SIR: The State Equalization Board, at a meeting held October 20, 1913, raised the assessed valuation of the real and personal property of your county, as assessed by you, from
27 $254,755,220 to $356,657,308, making an increase in valuation of $101,902,088, the rate per cent of said increase being 40%.

Said Board also fixed the rate of tax which is to be levied and collected within your county for state purposes at 1 3/10ths mills.

You are therefore ordered and directed to correct your assessment

roll by adding the above increase in valuation and your attention is also directed to Section 3, page 527 of the Session Laws of 1913, pertaining to your duties as assessor.

Respectfully,

THE COLORADO TAX COMMISSION,
By JOHN B. PHILLIPS.

Attest:
S. E. TUCKER,
Secretary.

XII.

That the said State Board of Equalization on the 20th day of October, 1913, at its meeting held as aforesaid, by resolution fixed the levy for state purposes for the State of Colorado, said levy being fixed by the board at 1.3 mills, and that thereafter and on the said day, the Auditor of State duly prepared and transmitted to Otto F. Thum as clerk and recorder of the City and County of Denver, a statement which reads as follows, and is hereby made a part hereof;

"October 20, 1913.

To Otto F. Thum, Commissioner of Property of the City
28 and County of Denver and Ex-officio Clerk of said City and County:

At a meeting of the State Board of Equalization, held on the 20th day of October, A. D. 1913, which meeting was held for the purpose of fixing the rate of tax to be levied and collected within the various counties of the state for state purposes, the following proceedings, among others were had:

By resolution, duly adopted, the valuation of the real and personal property of the City and County of Denver was increased from $254,755,220.00 to $356,657,308.00, making an increase in valuation of $101,902,088.00, the rate per cent of said increase being forty per cent (40%).

And by resolution, duly adopted, the rate of tax which is to be levied and collected within the City and County of Denver for State purposes was fixed at 1.3 mills.

RHODY KENEHAN,
State Auditor of the State of Colorado.

Dictated by Attorney General."

XIII.

That the said certificate of the State Board of Equalization showing the amount of increase of the valuation of the real and personal property in the City and County of Denver was received by the defendant, Clair J. Pitcher on the 24th day of October, 1913, but that said Clair J. Pitcher upon receiving same, failed and refused, and still fails, refuses and neglects and has furthermore declared his intention and determination hereafter to continue to refuse to

make such corrections in the assessment and assessment roll as are or may be necessary to carry out the orders and directions of the State Board of Equalization and of The Colorado Tax Commission for the year 1913, and has stated and declared that he will not correct said assessment roll until he is compelled to do so by an order of Court and that unless he is so commanded by an order of court, he will not make any of the corrections in the assessment or the assessment roll of his county which will or may be necessary to carry out the directions and requirements of the State Board of Equalization and the orders of The Colorado Tax Commission.

XIV.

That since this action has been commenced both the defendant Pitcher and the City Attorney of the City and County of Denver have declared that they will take no action in this proceeding except to file a demurrer and that their sympathies are with the contention of the plaintiff herein and defendants allegs on information and belief that this suit was brought by the plaintiff herein at the suggestion and at the solicitation of the assessor and city attorney of the City and County of Denver, and that both the assessor and the city attorney are willing and anxious that the prayer of the complaint seeking a restraining order against Pitcher from increasing the valuation of the property of plaintiff be sustained; that from the allegations contained in the complaint of the plaintiff herein and the foregoing allegations in this answer contained, these defendants are entitled to relief against the co-defendant Pitcher; that they have no speedy or adequate remedy at law and that only through a court of equity can they get the relief to which they are entitled; that all of the parties interested in the increase of valuation as set forth in the complaint herein are now before the court and the court has jurisdiction to hear and determine all questions that might arise to determine the ultimate rights of the parties herein.

Wherefore, defendants pray that this action be dismissed as to them; that the defendant Pitcher be required by an order of this court to increase the assessed valuation of the real and personal property of the City and County of Denver in accordance with the action and determination of the State Board of Equalization; for costs of suit, and for such other, further and general belief as to the court may seem meet in the premises.

FRED FARRAR,
Attorney General.
NORTON MONTGOMER-,
Assistant Attorney General.
FRANK C. WEST,
Assistant Attorney General.

STATE OF COLORADO,
City and County of Denver, ss:

Norton Montgomery, of lawful age, being first duly sworn, deposes and says: That he is Assistant Attorney General of the State of Colorado, that he has read the above and foregoing answer and cross bill and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge except as to those matters therein stated upon information and belief, and as to those matters, he believes it to be true.

NORTON MONTGOMERY.

Subscribed and sworn to before me this 4th day of November, A. D. 1913.

My commission expires February 6, 1917.

CLEMENT CROWLEY,
[SEAL.] *Notary Public.*

31 And afterwards, and on to-wit the 7th day of November, A. D. 1913, came the plaintiff and filed herein its Motion to Strike.

And said Motion to Strike is in words and figures as follows, to wit:

Filed in District Court, City & County of Denver, Colo., Nov. 7, 1913. J. Sherman Brown, Cler-.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. 1.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of all Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex Officio Assessor of the City and County of Denver, a Municipal Corporation, et al., Defendants.

Comes now the said plaintiff, by Benedict & Phelps, its attorneys, and moves the Court to strike out and to strike from the files herein the so-called further defense and cross-bill against the defendant Clair J. Pitcher, and for grounds of this motion plaintiff says:

I.

32 That the matters and things set forth and contained in the said so-called further defense and cross-bill relate to a controversy between the defendants themselves, and not to a controversy between plaintiff and the defendants or any of them.

II.

That the matters and things set forth and contained in said so-called further defense and cross-bill constitute and form the subject matter for a proceeding in mandamus and are not cognizable in an equity case for injunctive relief, and the court is without power or jurisdiction in this proceeding to hear, try, or determine said matters and things, or to grant the relief sought in and by the said so-called further defense and cross-bill.

III.

That the matters and things set forth and contained in said so-called further defense and cross-bill are immaterial, irrelevant and insufficient in this cause, and are not responsive to the averments of plaintiff's complaint herein.

IV.

That the filing of said so-called further defense and cross-bill is without warrant or authority of law, and there is no rule of practice or procedure and no statutory provision permitting or allowing the filing thereof.

V.

That in and by the said so-called further defense and cross-bill it is sought to litigate in this action a controversy between and among the defendants and to engraft upon a suit in equity for injunctive relief a proceeding in the nature of mandamus to compel and require a public officer to do certain things and to carry out cer-
33 tain orders and directions of the defendant Boards, thereby raising issues to which the plaintiff is not a party, and litigating a controversy which only indirectly affects the rights of the plaintiff.

Wherefore, plaintiff moves the Court as aforesaid, to strike out and to strike from the files herein the said so-called further defense and cross-bill against the defendant Pitcher.

BENEDICT & PHELPS,
Attorneys for Plaintiff.

And thereupon, and on to-wit the same day (November 7th, 1913) came the plaintiff and filed herein its Demurrer to the Answer of Defendants.

And said Demurrer is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Nov. 7, 1913. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. 1.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of all Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex Officio Assessor — the City and County of Denver, a Municipal Corporation, et al., Defendants.

34 Comes now the said plaintiff, by Benedict & Phelps, its attorneys, and demurs to the answer of the defendants other than the defendant Pitcher heretofore filed herein, the same consisting of paragraphs one to five inclusive of the so-called answer and cross-bill heretofore filed herein by the defendants other than the defendant Pitcher, and for grounds of such demurrer says:

I.

That said answer is insufficient in law and does not state facts sufficient to constitute a defense to plaintiff's complaint herein.

II.

That as appears upon the face of said answer and from the admissions and averments thereof, plaintiff is entitled to the relief sought herein, and nothing in said answer contained is sufficient in law to bar the granting of the relief prayed by plaintiff, in and by its complaint herein.

Wherefore, plaintiff demands judgment as in and by its complaint herein it has already demanded.

BENEDICT & PHELPS,
Attorneys for Plaintiff.

35 And afterwards, and on to-wit the 8th day of November, A. D. 1913, came the defendant Clair J. Pitcher and filed herein his Answer to the Cross Bill of the State Board of Equalization, etc.

And said Answer is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Nov. 8, 1913. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. One.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of All Others Similarly Situated who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, a Municipal Corporation; The State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Rhody Kenehan, and Fred Farrar, as the Members of the State Board of Equalization; The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link, as Members of The Colorado Tax Commission, Defendants.

Answer of Defendant Clair J. Pitcher to the Cross Bill of the State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Rhoady Kenehan, and Fred Farrar, as the Members of the State Board of Equalization; The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link, as Members of the Colorado Tax Commission.

Comes now Clair J. Pitcher, defendant above named, and
36 answering the cross-bill of the above named defendants The Colorado Tax Commission and the State Board of Equalization, for answer thereto says: for a First Answer and Defense:

First. That this Court is without jurisdiction of the subject matter of this proceeding.

Second. That the said cross-bill does not state facts sufficient to constitute a cause of action against this defendant Clair J. Pitcher, or to entitle the said petitioners to the relief demanded, or any part thereof.

Further answering the said cross-bill, and without in any way or manner waiving the defenses heretofore interposed, said defendant Clair J. Pitcher, says:

First. Admits that The Colorado Tax Commission is a commission designated and known as The Colorado Tax Commission, and that it was created by the laws of the State of Colorado and was and is authorized to bring in its own name suits and actions, in law or equity, but denies that the said Commission is by any law of the State of Colorado authorized to bring or institute, or cause to be

brought this action by way of cross-bill, upon its own initiative, or at all, and further denies that the action mentioned in said cross-bill is such an action as was or is necessary to enforce the laws of the State of Colorado for the assessment, levy and collection of taxes, for the supervision of the taxing functions of the State of Colorado by the several officers of the City and County of Denver or of the said City or of the said County of Denver; but on the contrary defendant, Clair J. Pitcher, alleges that the said The Colorado Tax Commission has failed and neglected to take such legal steps
37 or action as the law prescribes as conditions precedent to the bringing of this action, or any other action, either in law or equity, for the purposes enumerated and set forth in paragraph numbered 1 of the said cross-bill.

Second. Admits the allegations contained and set forth in paragraph II of the said cross-bill.

Third. Admits the allegations contained and set forth in paragraph III of said cross-bill.

Fourth. Admits the allegations contained and set forth in paragraph IV of said cross-bill.

Fifth. Admits the allegations contained and set forth in paragraph V of said cross-bill, save and except he denies sending a copy of said abstract to the Auditor.

Sixth. Admits that this defendant, Clair J. Pitcher, did, on or about September, 1913, transmit to the Clerk of The Colorado Tax Commission an abstract showing the real and personal property assessed by him as assessor and acting assessor of the City and County of Denver, and of the municipality known as the City and County of Denver, and the value thereof, and alleges that the value of said real and personal property so assessed by him as such assessor and ex officio assessor, contained and set forth in his said abstract so transmitted by him, was the true and full cash value of the said real and personal property within the municipality known as the City and as the County of Denver, State of Colorado, except that since the transmission of the said abstract so by him made he has increased the valuation of the assessable property within the municipality known as the City and County of Denver to the extent of Eight Million One Hundred and Fifty-four Thousand Three
38 Hundred and Ten Dollars ($8,153,310), and that the said valuation of the real and personal property in the said City and in the County of Denver, is, in the aggregate, including the public utilities assessed originally by The Colorado Tax Commission, Three Hundred and Nine Million, Three hundred and Fifty-eight Thousand Four hundred and Forty Dollars ($309,358,440), and that the said valuation last above set forth is the true and full cash value of all the real and personal property within the municipality known as the City and County of Denver and of the City and of the County of Denver, State of Colorado.

Seventh. This defendant, Clair J. Pitcher, further alleges, by way of answer to the said cross-bill, that he is not advised, nor has he any information regarding the acts of all other assessors of various and numerous counties of the State of Colorado in respect

to the transmission of abstracts, save as it appears from the said complaint; but this defendant, Clair J. Pitcher, alleges that he is informed and believes, and so charges the fact to be, that the assessors of the several counties of the State of Colorado have failed to transmit an abstract as alleged, showing the full and true cash value of the real and personal property of their respective counties; that he is unable to specifically set forth the names of such assessors or of such counties, but alleges that The Colorado Tax Commission were and are fully cognizant of the fact, and have in and by their report specified to the said Board of Equalization, in name and amounts, several such counties.

Eighth. That as to whether or not The Colorado Tax Commission examined each and all of the abstracts of the assessors of all of the counties in the state which had been transmitted to
39 them, and as to whether or not they secured information from various sources for the purpose of determining the true and full cash value of the real and personal property of all the counties of the state, this defendant has no knowledge or information upon which to base a belief, but he alleges that he is informed and believes that the said The Colorado Tax Commission did not accept nor act upon the reports of various of the persons whom the said Commission had employed to visit several of the counties of the state; but on the contrary this defendant alleges, upon information and belief, that the reports of the person or persons so employed by them to so visit the several counties of the state were ignored and wholly disregarded by the said Commission, and that the said Commission, nor the members thereof, did not, in the matter of investigating the work and methods of the county assessors, or of the boards of county commissioners, or of the county boards of equalization, or of the county treasurers in the assessment, equalization and collection of taxes, visit the several counties of the state, as in and by law they are required to do, and in particular, did not at any time confer with this defendant, or the Board of Equalization or the County Commissioners or the County Treasurer of the City and County of Denver, and that in the matter of the attempted equalization of values in the several counties of the state the said The Colorado Tax Commission did not pursue a uniform method or test for the purpose of ascertaining whether in fact and in truth the said valuations of real and personal property in the various counties of the state had been assessed at their full and true cash value, but on the contrary the said The Colorado Tax Commission pursued different methods or tests in determining the valuation in the
40 several counties of the state, and particularly pursued methods and tests in several counties far different from the test or method pursued in the City and County of Denver, in their attempt to determine the full and true cash value of real and personal property in said City and County of Denver.

This defendant, Clair J. Pitcher, is informed and believes, and so charges the fact to be, that the said The Colorado Tax Commission, arbitrarily, and without ascertaining the truth as to whether or not this defendant as assessor of the City and County of Denver had

valued the real and personal property within the City and County of Denver at its full and true cash value, proceeded to determine that this defendant had not made a full and true cash valuation of said property; without a careful and thorough investigation and without obtaining knowledge by inquiry as to values in said city and county they did in an arbitrary way, without warrant in fact, declare and determine that they would, regardless of the declarations of this defendant that he had determined the assessable valuation of the real and personal property in the said City and County of Denver at its true and full cash value, increase the valuation of the said real and personal property in the said City and County of Denver to the extent of One Hundred and One Million, Nine hundred and two thousand, and eighty-eight dollars ($101,902,088), making the rate of said increase in valuation of the assessable property within the City and County of Denver of forty per cent.

Ninth. This defendant, Clair J. Pitcher, admits that The Colorado Tax Commission made a report of its action and findings and transmitted the same to the State Board of Equalization of the
41 State of Colorado, and that the said statement so transmitted shows the amount to be added to or deducted from the valuations of the real and personal property of the counties of the state, but denies that the said Commission in determining the valuation of such real and personal property of the several counties of the state, and particularly in the municipality known as the City and County of Denver and of the County of Denver, proceeded in all respects or in any respect, according to the provisions of the laws of the state of Colorado in such case made and provided, or of any law; but on the contrary alleges that the said Tax Commission wholly neglected to properly and legally value the real and personal property in the City and County of Denver on a basis of valuation placed upon other and similar property in the various counties in the State of Colorado, and that their action in increasing the assessable valuation of the real and personal property in the City and County of Denver was unlawful and fraudulent in so far as their said action affects the owners of real and personal property in said city and county and the taxpayers thereof, and that in making their said assessed valuations of the amount as aforesaid, the said The Colorado Tax Commission did not ascertain and determine the true and full cash value of property, real and personal, in the City and County of Denver, but on the contrary, increased, unlawfully and fraudulently, the valuations of the assessable property, real and personal, in said city and county, forty per cent in excess of its full and true cash value.

Tenth. This defendant, Clair J. Pitcher, admits that the State Board of Equalization consists of the Governor, Secretary of State, Treasurer, Auditor and Attorney General; that they met on
42 the first Monday in October, 1913, and that they convened as a State Board of Equalization at the executive office in the Capitol Building in the City and County of Denver; admits that the said board met for the purpose, among other things, of examining the various assessments of the various counties of the state, and

for the purpose of equalizing said assessments in the various counties of the state, and admits that the purpose of such examination might have been to secure a just valuation and taxation of all of the property real and personal within the several counties of the State of Colorado; but this defendant denies that the said State Board of Equalization did, at any of its meetings or at any time or in any manner, secure a just valuation of the assessable property real and personal within the several counties of the state; on the contrary this defendant, Clair J. Pitcher, alleges, upon information and belief, that the said State Board of Equalization, without sufficient inquiry and without a thorough investigation and without a careful examination of the assessment rolls of the various counties and of the assessment roll of the City and County of Denver, and without inquiry into the facts or into the manner or method of the said The Colorado Tax Commission in reaching its conclusion, accepted the report or statement of the said The Colorado Tax Commission as to values in the several counties and proceeded to arbitrarily increase the valuations, upon the said report alone, of the assessable value of real and personal property in the municipality known as the City and County of Denver and of the City and of the County of Denver.

Eleventh. Admits that on the 6th day of October, 1913,
43 the statement of The Colorado Tax Commission so as aforesaid unlawfully and fraudulently prepared, was transmitted to and received by the State Board of Equalization, but as to whether the said board examined the abstracts of assessment as transmitted to it by The Colorado Tax Commission, or as to whether the said abstract so submitted comprised all of the abstracts of the various assessors of the State of Colorado, and were considered by the said The Colorado Tax Commission, this defendant has no information upon which to base a belief; but this defendant denies that the said Board of Equalization was fully advised by its consideration of the said abstracts, or by any statement or argument or any information obtained from any source by it or by its members, of the true, full cash value of real and personal property within the City and County of Denver, or in any of the various counties of the State of Colorado; but admits that on or about the 20th day of October, 1913, while sitting as a Board of Equalization as aforesaid, said board made a report of its action and that said board made a certificate of its action and that it transmitted the same to the various county assessors of the state, including therein a certificate to this defendant, Clair J. Pitcher, and admits that the certificate was in the words and figures as set forth in paragraph X of this said cross bill, and admits that there was transmitted to this defendant the order of The Colorado Tax Commission in words and figures as set forth in paragraph X of the said cross bill.

Twelfth. Admits the allegations contained and set forth in paragraph XII of said cross bill.

Thirteenth. This defendant, Clair J. Pitcher, further an-
44 swering, admits that he received the said certificate of the State Board of Equalization on or about the afternoon of the 24th day of October, 1913, showing the amount of the increase of

the valuation of the real and personal property in the City and County of Denver as determined by the said State Board of Equalization, and admits that upon the receipt of the same he declared it to be his intention and determination not to make the corrections in his assessments and assessment roll as he was required to do by the said certificate of the said The Colorado Tax Commission and of the State Board of Equalization. Admits that he stated and declared that he will not correct said assessment roll until he is compelled to do so by the order of the court.

Fourteenth. This defendant, Clair J. Pitcher, further alleges, by way of answer, that he is not obligated to comply with the directions of the said State Board of Equalization or of the said The Colorado Tax Commission in thus increasing the value of the real and personal property in the City and County of Denver, and as reason therefor this defendant says that the said The Colorado Tax Commission was and is wholly without power or authority to make any raise or increase in the valuation of the real and personal property in the City and County of Denver, and that the attempt of the said The Colorado Tax Commission so to do was and is null and void and of no force, or effect; that the purported and pretended action of the said The Colorado Tax Commission, as hereinbefore set forth, was and is an attempt to deprive this defendant of his powers as a constitutional officer of the State of Colorado and of his powers as assessor and ex officio assessor of the City and County of Den-
45 ver, and further to deprive the Board of Equalization of the City and County of Denver and of the County of Denver of its power to sit as a board of equalization to adjust and equalize the values of real and personal property within the City and County of Denver and within the County of Denver, and that the said Act of the general assembly of 1911 creating the said The Colorado Tax Commission is null and void and of no force or effect, and that the purported and pretended action of the said The Colorado Tax Commission, as in the said cross bill recited, was and is an attempt to deprive the owners and taxpayers of the City and County of Denver and of the County of Denver of their property without due process of law and in violation of the provisions of the Fourteenth Amendment to the constitution of the United States, and in violation of the provisions of Section 25 of Article II of the constitution of the State of Colorado. That the action of the State Board of Equalization is likewise null and void and of no force and effect, because this defendant says that the said action did not amount to an attempt to adjust and equalize the valuation of real and personal property in the several counties of the state, but on the contrary said action of them the said The Colorado Tax Commission and of the said State Board of Equalization amounted to an increase of the aggregate valuation of all the real and personal property in the City and County of Denver and of the County of Denver, and denies the right and opportunity to be heard to property owners of the City and County of Denver on account of the increased valuation of their real and personal property. That under and by virtue of Section 3 of Chapter 134 of the Session Laws of 1913 it is provided that on or

before October 25th of each year the county assessors of the
46 various counties of the State of Colorado shall certify to the clerk of each city and town within the county the total valuation of assessable property within each such city and such town, directing each city and such town through its clerk to officially certify its levy for town or city purposes upon such valuation to the Board of County Commissioners or to the persons acting as such County Commissioners or ex officio County Commissioners, prior to November 1st, and that in and by said section it is further provided that on or before October 25th of each year the assessor shall certify to the county superintendent of schools the assessable valuation of all property within each school district in the county, and that the county superintendent of schools is required by said section 3 to immediately notify the clerks of the several school boards of the various school districts within the county, and upon receipt of such notice each such school board is directed to make their levy of taxes and certify the same to the county superintendent of schools on or before November the 1st of the current year, and this defendant says that under and by virtue of the provisions of the said section and in conformity therewith he has duly notified the authorities of the municipality known as the City and County of Denver and of the County of Denver of the assessable valuation of the real and personal property in the said City and County of Denver, and of the aggregate amount, as hereinbefore set forth, and that the said school authorities and the authorities of the municipality known as the City and County of Denver and of the County of Denver have, in conformity with the provisions of Section 3 of Chapter 134, Session Laws of 1913, duly made their levy for all purposes and have,
47 by the direction of the State Board of Equalization and the said The Colorado Tax Commission made a levy for state purposes upon the assessed valuation of the real and personal property within the City and County of Denver, of the amount as hereinbefore recited and set forth.

Fifteenth. This defendant admits that since the institution of this action by the plaintiff herein he, as assessor of the City and County, has taken no action with reference to complying with the order of the said The Colorado Tax Commission or with the order or statement of the said State Board of Equalization, and that his sympathies are with the plaintiff herein, and alleges upon information and belief that the sympathies of the legal department of the City and County of Denver are with the plaintiff herein, and admits that both he and the City Attorney are willing and anxious that the prayer of the plaintiff seeking a restraining order against him for the increased valuation of the property of the plaintiff may be sustained.

Sixteenth. This defendant, Clair J. Pitcher, further answering said cross-bill, says, that the said certificate or order of the said The Colorado Tax Commission is wholly void and of no effect, in this: that the same does not comply with the provisions of the laws of the State of Colorado, and particularly with the provisions of Section 32 of the Act of the general assembly of 1911, to-wit, Chapter 216,

wherein it is provided that the said commission, when it has determined the true value of the real and personal property in the several counties of the State of Colorado, shall transmit to the State Board of Equalization a statement of the amount to be added to or deducted from the valuation of the real and personal property of each county, specifying the amount to be added to or to be de-
48 ducted from the values of the real or personal property, and that the said certificate or report of the said The Colorado Tax Commission so transmitted to the said State Board of Equalization did not in anywise or in any manner attempt to advise as to the class of property or what property, whether real or personal, there should be a specified amount in valuation added thereto; that in order to comply with the order of the said State Board of Equalization and of the said The Colorado Tax Commission, this defendant must, if compelled to so comply with said order, add an assessable value horizontally to each and all of the real and personal property within the City and County of Denver, equivalent to a forty per cent increase thereof, and that it is a matter of utter impossibility for him to single out or select any one place, parcel or item of assessable property to which the said increased valuation could be added; that it is utterly impossible for him to select or single out any classes or class of property, real or personal, in the City and County of Denver, to which the said increased valuation shall be added, and that if he shall be compelled to add the said increased valuation to all of the assessable property, real and personal, of the said City and County of Denver and County of Denver, as by the said Board of Equalization directed, the real and personal property within the City and County of Denver will be assessed in excess of its full and true cash value to the full extent of the said forty per cent, and that no property owner whose property is thus increased or added to by way of valuation has any relief or method or manner of obtaining relief from the increased valuation so to be added
49 by him, as assessor as aforesaid, and that the time for the meeting of the County Board of Equalization for the year 1913, and the time for the equalizing and adjusting of the taxes within the City and County of Denver by said County Board of Equalization has long since passed, and he is advised and so advising believes that the property owners whose property is thus increased in valuation are wholly without remedy, that there is no legal or statutory relief afforded to them or any of them, that to so increase horizontally the valuation of the property within the City and County of Denver is unjust and will create an inequitable valuation, and would attach additional and unlawful and fraudulent burdens to the property owners and taxpayers of the City and County of Denver.

The defendant, Clair J. Pitcher, further answering the cross-bill, says:

First. That under and by virtue of the laws of the State of Colorado, he is required, if he shall raise the assessments by way of increasing the valuation of the property of the taxpayers or property owners within the City and County of Denver or of the County of Denver, to give due notice of his action in that respect and to notify

each and every of the taxpayers or property owners whose property he shall thus assess by way of increasing the valuation thereof, and that such taxpayers or property owners after such notice is (are) entitled by law to protest against such action on his part as such assessor and to a hearing thereon, and that each and every of such taxpayers and property owners in said City and County of
50 Denver and of the County of Denver are further entitled by law to appeal from the decision or conclusions of this defendant as such assessor with reference to the matter of such increased assessment or valuation of his or their property, to the Board of County Commissioners sitting as a Board of Equalization, and that if he shall be required to increase the valuations of the real and personal property to the extent and of the amount specified in the order or direction of the said State Board of Equalization and of the said The Colorado Tax Commission, as set forth in the said cross-bill herein, then and in such case the said property owner or taxpayer is debarred from his right to protest against said increase and his right to a hearing thereon before the assessor, this defendant, and his appeal from the action of this defendant as assessor aforesaid, to the County Board of Equalization, and from any hearing of the matters before such Board of Equalization; that he has been advised by counsel that notice in case of a material addition to his schedule is required by law, and that if he shall omit to conform to the provisions of the statutes requiring such notice to be given to the taxpayers, as hereinbefore set forth, if he shall make a material addition to his schedules of property he is acting in violation of the law, and that the taxpayer and property owner is thereby deprived of a substantial statutory right, and that to give him such notice and allow him a hearing is a condition precedent to the validity of any levy upon any property by him assessor of the City and County of Denver or of the County of Denver.

Second. And defendant further says, by way of answer to
51 the said cross-bill, that the action of the said, The Colorado Tax Commission, and of the said State Board of Equalization in increasing the value of the real and personal property of the taxpayers and owners of the same within the City and County of Denver was arbitrary and wholly without authority or warrant in law, and that the same is and was in fraud of the rights and privileges conferred upon property owners and taxpayers in the City and County of Denver and other counties within the State of Colorado, and was and is an infringement upon the constitutional powers conferred upon the County Board of Equalization by section 15 of Article X of the constitution of the State of Colorado, and that in order for this defendant to comply with the order of the said The Colorado Tax Commission and of the said State Board of Equalization, he will be compelled to add to all of the property real and personal within the said City and County of Denver and the County of Denver an increased valuation equal to forty per cent thereof, and that he will then be wholly without authority in law to advise or notify any of the property owners and taxpayers within said City and County of Denver and the County of Denver of his action in

thus increasing the valuation of their property, and that the act of the legislative assembly of 1911 and of the legislative assembly of 1913, hereinbefore referred to, wherein and whereby a pretended authority is claimed to be vested in the said The Colorado Tax Commission and the said Board of Equalization to increase the value of the real and personal property in the several counties of the state in excess of the valuations of the assessors of the said respective counties of the state, is void, because this defendant says that the same is in conflict with the constitution of the State of Colorado
52 and with the constitution of the United States.

Third. And further answering the said cross-bill this defendant, Clair J. Pitcher, says, that the action of the said defendants The Colorado Tax Commission and the State Board of Equalization herein, has been prematurely instituted, for the reason that under and by virtue of the provisions of Sec. 5636 of the Revised Statutes of the State of Colorado of 1908, it is provided that whenever and wherever corrections or additions to assessments shall be required by the State Board of Equalization, that the assessor thereof, if he so desire, may have an appeal from the decision of the said State Board of Equalization to the District Court of the County of which he is assessor, which appeal shall be taken as appeals are now taken from boards of county commissioners, and that the manner of taking such appeal and perfecting the same is provided for by section 1225 of the Revised Statutes of the State of Colorado of 1908. And this defendant says that he, has, as assessor of the City and County of Denver, duly and formally prayed an appeal from the action of the said State Board of Equalization in thus adding to the valuations of the real and personal property within the said City and County of Denver over and above the valuations of this defendant, the said sum of One Hundred and One Million, Nine Hundred and Two Thousand and Eighty-eight Dollars ($101,902,088) to the District Court of the Second Judicial District of the State of Colorado sitting within and for the City and County of Denver and the County of Denver, and that under and by virtue of the Provisions of the statute in such case made and provided the period for perfecting the said appeal has not yet expired, and that it is his purpose and
53 intention to perfect said appeal from the said action of the said State Board of Equalization, and prosecute the same to final determination.

Fourth. And further answering the said cross-bill this defendant, Clair J. Pitcher, says, that the said act of the legislative assembly of 1911, approved June 2nd, 1911, known as Chapter 216 Session Laws of 1911, is void and invalid because it is in violation of Section 35 of Article V of the constitution of the State of Colorado, in this: that it is an attempt to delegate to a special commission power to make, supervise and interfere with property and effects to the municipality known as the City and County of Denver, and that it is an attempt to supervise and interfere with the performance of municipal functions which have been conferred upon the municipality of the City and County of Denver by Article XX of the constitution of the State of Colorado.

Fifth. Further answering the said cross-bill, this defendant says, that the said Act entitled An Act "to create a permanent Tax Commission and defining its duties and powers, and penalties for the violation of the provisions herewith, making an appropriation therefor, and repealing all other acts and parts of acts in conflict herewith," being Chapter 216 of the Session Laws of the Eighteenth General Assembly of the State of Colorado, and known as House Bill No. 211, is not a valid and existing act of the said legislative assembly, and was not passed in the manner and form as provided for by Section 26 of Article V of the state constitution, by the said legislature; that in and by Section 26 of Article V of the state constitution it is provided that the presiding officer of each house
54 shall, in the presence of the House over which he presides, sign all bills and joint resolutions passed by the general assembly, after their title shall have been publicly read, before signing, and the fact of signing shall be entered on the Journal; and this defendant says, upon information and belief, that said House Bill No. 211, being the said act hereinbefore referred to, was passed through the House of Representatives and was thereafter referred to the Senate of the said legislative assembly, and that in the said Senate certain amendments were added to the said House Bill so transmitted to the Senate as aforesaid, and that *if* there appears from the journal of the House of Representatives of the said general assembly, at page 2054 of said journal, that the House of Representatives of said legislative assembly concurred in the said Senate amendments, but that the journal of the said House of Representatives and the record thereof does not show that the speaker announced, at the time, and before the signing of the said House Bill 211, being the act aforesaid, that he was about to sign and would sign the said bill, and that there appears to be no record in the said journal showing that the speaker of the said House of Representatives did sign said House Bill No. 211, being the act above referred to.

Sixth. The defendant, Clair J. Pitcher, further answering the cross-bill, denies each and every allegation in the said cross-bill contained, not herein admitted or specifically denied.

Wherefore, defendant, Clair J. Pitcher, having answered all of the matters and things in the said cross-bill contained as he is advised it is necessary for him to answer, prays to be dis-
55 missed in this action with his costs in this behalf sustained.

I. N. STEVENS,
GEO. Q. RICHMOND.

STATE OF COLORADO,
City and County of Denver, ss:

Clair J. Pitcher, being duly sworn, upon oath deposes and says, that he is the defendant Clair J. Pitcher, referred to in the cross-bill herein, and that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true of his own personal knowledge save and except such matters and things as are stated upon information and belief, and as to those matters he believes them to be true.

CLAIR J. PITCHER.

Subscribed and sworn to before me this 8th day of November, 1913.

My commission will expire November 13th, 1915.

[SEAL.] I. ANSON WEST,
Notary Public.

56 And afterwards, and on to-wit the 10th day of November, A. D. 1913, came the plaintiff and filed herein its Stipulation. And said Stipulation is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Nov. 10, 1913. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. 1.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of All Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex Officio Assessor of the City and County of Denver, a Municipal Corporation, et al., Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys, that plaintiff's complaint herein shall be deemed amended by the insertion of the following paragraph between the fifth and sixth lines from the top of page 7 of said complaint, namely:

57 "That said defendant, The Colorado Tax Commission, did not comply nor attempt to comply with the provisions of paragraph Seventh of Section 13 of the Act of the General Assembly of the State of Colorado entitled 'An Act to create a permanent tax commission, etc.,' being Chapter 216 of the Session of Laws of 1911 approved June 2, 1911; nor did said defendant The Colorado Tax Commission comply with or attempt to comply with any of the provisions of said paragraph Seventh nor give to this plaintiff nor to the owners of any property in the City and County of Denver, or any thereof, any notice whatever of any intention or purpose to raise or lower the assessed value of any real or personal property in the City and County of Denver, aforesaid, and did not fix any time or place for hearing this plaintiff or any other person or persons interested as the owners of property in said City and County of Denver,

and no hearing was held or had in said matter by said defendant The Colorado Tax Commission."

And it is further stipulated and agreed that the demurrer of the defendant Pitcher to said complaint shall stand to said complaint as so amended and that the answer of the other defendants herein to said complaint shall stand as the answer to said complaint as amended.

BENEDICT & PHELPS,
Attorneys for Plaintiff.
I. N. STEVENS,
GEORGE Q. RICHMOND,
Attorneys for Defendant Pitcher.
FRED FARRAR, *Att'y Gen.;*
NORTON MONTGOMERY &
FRANK C. WEST,
Attorneys for Defendants Other Than the Defendant Pitcher.

58 And thereupon, and on to-wit the same day (November 10, 1913) came the defendants The State Board of Equalization and The Colorado Tax Commission, and filed herein their Demurrer to Answer of Clair J. Pitcher.

And said Demurrer is in words and figures as follows, to-wit:

Filed in District Court, City & County of Denver, Colo., Nov. 10, 1913. J. Sherman Brown, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Division 1.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of All Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, a Municipal Corporation; The State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Rhody Kenehan, and Fred Farrar, as the Members of the State Board of Equalization; The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link, as Members of the Colorado Tax Commission, Defendants.

Demurrer to Answer of Clair J. Pitcher.

Come now the above named defendants, The State Board of Equalization and The Colorado Tax Commission, by Fred Farrar, Attorney

General of the State of Colorado, their attorney, and demur
59 to the answer of the defendant Clair J. Pitcher to the cross-bill of said The State Board of Equalization and The Colorado Tax Commission, and as grounds therefor allege that said answer does not state facts sufficient to constitute a defense against said cross-bill.

FRED FARRAR,
Attorney General of Colorado.
NORTON MONTGOMERY,
FRANK C. WEST,
Assistant Attorneys General.

And thereupon, and on to-wit the same day (November 10, 1913) the following proceedings, inter alia, were had and entered of record in said court, to-wit:

No. 56520.

THE BI-METALLIC INVESTMENT CO., etc.,
vs.
CLAIR J. PITCHER, Commissioner of Finance, etc., et al.

Injunction.

At this day come the parties hereto by their attorneys respectively, and thereupon this cause coming on to be heard upon the plaintiff's demurrer to the answer and cross-bill of all defendants other than the defendant Pitcher, the same is argued by counsel and the Court being now sufficiently advised in the premises, doth sustain the same.

60 No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, etc.,
vs.
CLAIR J. PITCHER, Commissioner of Finance, etc., et al.

Injunction.

At this day comes the plaintiff and asks the court for leave and is granted leave to withdraw its motion to strike from the files herein the said so-called further defense and cross-bill against the defendant Pitcher.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, etc.,
vs.
CLAIR J. PITCHER, Commissioner of Finance, etc., et al.

Injunction.

At this day comes the parties hereto by their attorneys respectively, and thereupon this cause coming on to be heard upon the defend-

ant Pitcher's demurrer to the plaintiff's complaint, the same is argued by counsel and the Court being now sufficiently advised in the premises, doth overrule the same.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, etc.,
vs.
CLAIR J. PITCHER, Commissioner of Finance, etc., et al.

Injunction.

At this day come the parties hereto by their attorneys respectively, and thereupon this cause coming on to be heard upon the demurrer of the defendants, The State Board of Equalization and The
61 Colorado Tax Commission to the answer of defendant Clair J. Pitcher to the cross-bill of said State Boards, the same is argued by counsel and the Court being now sufficiently advised in the premises, doth overrule the same.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, etc.,
vs.
CLAIR J. PITCHER, Commissioner of Finance, etc., et al.

Injunction.

At this day comes the said plaintiff by its attorneys, and on its motion,

It is ordered by the Court that the Injunction as prayed for in the bill filed in this cause be and the same is granted and by order of Court made permanent herein.

No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, etc.,
vs.
CLAIR J. PITCHER, Commissioner of Finance, etc., et al.

Injunction.

At this day come the parties hereto by their attorneys respectively, and thereupon this cause coming on to be heard upon the prayer in the cross-bill for mandamus against Clair J. Pitcher, Commissioner of Finance, the same is argued by counsel and the Court being now sufficiently advised in the premises, doth deny the same.

62 No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, etc.,
vs.
CLAIR J. PITCHER, Commissioner of Finance, etc., et al.

Injunction.

At this day come the parties hereto by their attorneys respectively, and thereupon this cause coming on to be heard upon the demurrer of the defendants other than Pitcher to the complaint of the plaintiff and the answer of the defendant Clair J. Pitcher, the same is argued by counsel and the Court being now sufficiently advised in the premises, doth overrule the same.

And thereupon the defendants, The State Board of Equalization and the Colorado Tax Commission saith that they will and do abide by their answer and cross-bill and that they will plead no further.

Whereupon it ordered by the Court that the said plaintiff and defendant Clair J. Pitcher, Commissioner of Finance go hence hereof and have and recover of and from said defendant their costs in this behalf laid out and expended to be taxed and have execution therefor, and let decree be entered in the Judgment Book.

62½ No. 56520.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of All Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action,
vs.
CLAIR J. PITCHER, as Commissioner of Finance and Ex Offico Assessor of the City and County of Denver, a Municipal Corporation; The State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Rhoady Kenehan and Fred Farrar as the Members of the State Board of Equalization; The Colorado Tax Commission and John B. Phillips, J. Frank Adams and Celsus P. Link, as Members of The Colorado Tax Commission.

Injunction.

Said cause having on, to-wit, the 10th day of November, A. D. 1913, come on to be heard upon the demurrer of the plaintiff to the answer of the defendants herein other than the defendant Pitcher, and likewise upon the motion of the plaintiff to strike from the files herein the cross-bill of the defendants other than the defendant Pitcher against said defendant Pitcher, likewise upon the demurrer of the defendants other than the defendant Pitcher to the answer of the defendant Pitcher to the aforesaid cross-bill, and the plaintiff appearing by Horace Phelps, one of its attorneys, the defendant Pitcher appearing by I. N. Stevens, Esquire, and George Q. Richmond, Esquire, his attorneys, and all other defendants herein appearing by Fred Farrar, Esquire, Attorney General of the state of

Colorado and Norton Montgomery and Frank C. West Assistant Attorneys General, and the Court hacing heard the arguments of counsel and having duly considered the same, and being
63 fully advised in the premises, did overrule the demurrer of the said defendant Pitcher to the complaint herein, and did sustain the demurrer of the plaintiff to the answer of the defendants other than the defendant Pitcher, and did overrule the demurrer of said defendants other than the defendant Pitcher to the answer of the defendant Pitcher to the cross-bill herein; and the plaintiff hacing withdrawn the said motion to strike the said cross-bill and thereupon the several parties aforesaid having elected to abide and stand by their several pleadings herein, and not to further plead nor to amend, and all the parties consenting that the hearings aforesaid be and constitute the final hearings in the said District Court in said cause, and that the Court proceed to enter final judgment and decree in accordance with its rulings.

It is, therefore, Considered ordered, adjudged and decreed that the plaintiff is entitled to and be granted the relief sought herein by its said complaint (as amended by stipulation herein), and further, that the defendants other than the defendant Pitcher are not entitled to any relief by virtue of their cross-bill against the defendant Pitcher herein, and

It is further considered ordered, adjudged and decreed, that the cross-bill of the defendants other than the defendant Pitcher herein be and the same is hereby dismissed at the cost of the defendants filing the same, and that the said defendants take nothing by virtue of the said cross-bill. And

It is further considered, ordered, adjudged and decreed that the defendants and each of them and all persons acting under them or either of them or by their authority or subject to their
64 control, be and they are hereby forever restrained and enjoined and commanded to absolutely refrain and desist from taking any steps whatever to enforce or carry out any increase in the assessed valuations of the property of plaintiff and others in like situation, for the year 1913, to-wit, property situate in the City and County of Denver, aforesaid, and from enforcing or seeking to enforce or carry out any order, resolution, direction or action of the State Board of Equalization or the Colorado Tax Commission to that end; and that a permanent writ of injunction issue herein, in accordance herewith.

It is further ordered and decreed, that the plaintiff do have and recover of and from the defendants herein its costs herein to be taxed.

Done at Denver, Colorado, this 10th day of November, A. D. 1913.

By the Court:

GEO. W. ALLEN, *Judge.*

No. 56520.

THE BI-METALLIC INVESTMENT CO., etc.
vs.
CLAIR J. PITCHER, Commissioner of Finance, etc., et al.

Injunction.

At this day come the said defendants other than Pitcher by their attorneys, and on their motion;

It is ordered by the Court that the issuance of execution herein be, and the same hereby is, stayed for the period of 10 days from this day.

65 STATE OF COLORADO,
City and County of Denver, ss:

I, J. Sherman Brown, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of Complaint; Demurrer; Answer and Cross Bill; Motion to Strike; Demurrer to the Answer; Answer of Clair J. Pitcher to Cross Bill etc.; Stipulation; Demurrer to Answer of Clair J. Pitcher; and Orders of Court had and entered of record in a certain cause in said Court lately depending wherein The Bi-Metallic Investment Company, a Corp., etc. was Plaintiff, and Clair J. Pitcher, etc., et al., were Defendants, as the same now remains on file and of record in this office.

Witness my hand and seal of said Court, at the Court House in Denver, County and State aforesaid, this 15th day of November, A. D. 1913.

[SEAL.] (Signed) J. SHERMAN BROWN, *Clerk.*
—— ——, *Deputy Clerk.*

66 Filed in Supreme Court, Nov. 15, 1913. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 8208.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS, James B. Pearce, M. A. Leddy, Roady Kenehan and Fred Farrar, as the Members of the State Board of Equilization; the Colorado Tax Commission and John B. Phillips, J. Frank Adams and Celsus P. Link, as Members of the Colorado Tax Commission, Plaintiffs in Error,

vs.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, and CLAIR J. PITCHER as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

Error to the District Court of the City and County of Denver.

Assignments of Error.

Come now the said plaintiffs in error and respectfully show unto the Court that there is manifest and prejudicial error in the record, proceedings and judgment in this cause in the following particulars, to-wit:

I.

The court erred in sustaining plaintiff's demurrer to the answer of plaintiffs in error.

II.

The court erred in over-ruling the demurrer of the defendant Pitcher to the complaint.

66½ III.

The court erred in over-ruling the demurrer of plaintiffs in error to the answer of defendant Pitcher to the cross-bill.

IV.

The court erred in granting an injunction against plaintiffs in error and the defendant Pitcher.

V.

The court erred in over-ruling the demurrer of plaintiffs in error to the complaint.

VI.

The court erred in rendering judgment in favor of the plaintiff and against the defendants in said action, and in granting to the plaintiff the relief prayed in its complaint or any relief.

Wherefore plaintiffs in error pray that the said judgment may be reversed and the said cause remanded to the District Court of the City and County of Denver for such proceedings therein as the law requires and as this Court may direct.

(Signed) FRED FARRAR,
Attorney General;
FRANK C. WEST,
Assistant Attorney General;
NORTON MONTGOMERY,
Assistant Attorney General,
Attorneys for Plaintiffs in Error.

67 (Endorsed:) No. —. In the Supreme Court of the State of Colorado. The State Board of Equalization, et al., plaintiffs in error, vs. The Bi-Metallic Investment Company, et al., defendants in error. Assignments of error.

68 And afterwards, and on to-wit, November 20, 1913, there was filed in our Supreme Court the following Stipulation, which is in words and figures as follows:

In the Supreme Court of the State of Colorado.

No. 8208.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Suing in its Own Behalf and on Behalf of All Others Similarly Situated Who Shall Join Herein and Contribute to the Cost of This Action, Plaintiff,

vs.

CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, a Municipal Corporation, et al., Defendants.

Writ of Error to the District Court of the City and County of Denver.

Stipulation.

It is hereby stipulated and agreed, by and between the above named parties, that the above entitled cause may be determined by this Court on the briefs of counsel which are filed and to be filed, and upon the oral arguments to be made in the case now pending in this court of The People, etc. vs. Clair J. Pitcher, No. 8200, and that when said briefs are filed and said oral arguments are made, this cause shall, thereupon, be submitted for its determination without further argument or briefs.

69 And it is further stipulated and agreed that all questions properly involved in this case which are not involved in said case No. 8200 may be by the Court considered and determined

in the same manner as though said briefs and arguments had been filed and made herein.

(Signed) BENEDICT & PHELPS,
Attorneys for the Bi-Metallic Inv. Co.
I. N. STEVENS,
GEO. Q. RICHMOND,
Attorneys for Clair J. Pitcher;
FRED FARRAR,
Attorney General;
NORTON MONTGOMERY,
Assistant Attorney General;
FRANK C. WEST,
Assistant Attorney General,
Attorneys for All the Defendants Other Than Clair J. Pitcher.

70 And further, and on to-wit, February 2, 1914, the following judgment was entered of record in our said Supreme Court, which is in words and figures as follows:

No. 8208.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS et al., as Members of said Board; The Colorado Tax Commission and John B. Phillips et al., as Members of said Commission, Plaintiffs in Error,

vs.

THE BI-METALLIC INVESTMENT COMPANY and CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

Error to the District Court of the City and County of Denver.

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of the said District Court be, and the same is hereby, reversed, annulled, and altogether held for naught; and that this cause be remanded to said District Court which is directed to dissolve the injunction and dismiss the action.

It is further ordered and adjudged that the said plaintiffs
71 in error do have and recover of and from said defendants in error their costs in this behalf expended, to be taxed, and that execution issue therefor.

And let the opinion of the Court filed herein be published, which said opinion is in words and figures as follows, to-wit:

72 No. 8208.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS, James B. Pearce, M. A. Leddy, Rhoady Kenehan, and Fred Farrar (as the Members of the State Board of Equalization); The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link (as Members of the Colorado Tax Commission), Plaintiffs in Error,

vs.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, and CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

Error to the District Court of the City and County of Denver.

Judgment Reversed and Remanded.

Hon. George W. Allen, Judge.
Hon. Fred Farrar, Attorney General;
Mr. Norton Montgomery, Asst. Att'y Gen'l;
Mr. Frank C. West, Asst. Att'y Gen'l, For plaintiffs in Error.
Messrs. Benedict & Phelps, For Defendants in Error.

Mr. Justice WHITE Delivered the Opinion of the Court.

73 By order of the trial court, plaintiffs in error, and Clair J. Pitcher as county assessor, were enjoined, at the suit of defendants in error, from taking any steps whatever to enforce or carry out an order, resolution, direction or action of the State Board of Equalization or the Colorado Tax Commission whereby the assessed valuations of the property of defendants in error, and others in like situation, were increased for the purpose of taxation for the year 1913 over and above the assessed valuations placed thereon by the county assessor for said year. The State Board of Equalization and the Colorado Tax Commission, of the parties defendant below, sued out, and prosecute this writ of error from that judgment. At the time the cause was filed here there was pending in this Court an original case entitled: The People of the State of Colorado, ex rel. The State Board of Equalization and The Colorado Tax Commission, petitioner, v. Clair J. Pitcher, Commissioner of Finance and Ex Officio Assessor of the City and County of Denver, respondent, involving the validity of the identical acts of the several public boards and officers involved in this suit. Thereupon it was stipulated and agreed by the parties litigant herein that this cause should be determined upon the briefs filed and arguments made in the aforesaid original case. The decision in that case, — Colo., —, upholds the validity of the acts in question, and directs the performance of the acts which the trial court enjoined. This necessarily requires a reversal of the judgment here involved.

However, as the recent case of Blomquist, et al. Idaho Tax Commission vs. Board of Commissioners of Bannock County, — Idaho, —; 137 Pac., 174, is said to be in direct conflict with the conclusions reached in The People, ex rel. v. Pitcher, supra, it is
74 not improper to briefly consider the former case herein and supplement, by additional argument, our views in the latter case. In doing this it is essential to keep in mind that the legislative act under consideration in the Idaho case, (Idaho S. L. 1913, p. 167), has no similarity to the Colorado act under consideration in the Pitcher case, except solely that the two acts designate the agencies therein and thereby created, as the Tax Commission of such states respectively. Moreover, our constitution in regard to revenue officers is, in substantial respects, unlike the Idaho Constitution in that regard. While §6 of Art. XVIII of the Idaho Constitution provides for the election, every two years in each of the several counties of the state, of certain county officers, including county assessors, and, in that regard, is substantially the same as §8 of Art. XIV of our constitution, there is, in the same section of the former, an express prohibition not found in our constitution against the legislature creating any other county offices. Of course, if the legislature can create no other county offices, it is powerless to authorize other officers, than those designated in the constitution, to perform any of the functions of a county officer named in the constitution. Our constitution creates many offices, the duties of which it does not prescribe, but places no limitation upon the creation of others. "In judging what it means we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." Cooley's Const. Lim. (7th ed.), p. 94. When it was adopted certain territorial
75 statutory laws existed which were continued in force, so far as not inconsistent therewith, "until they expire by their own limitation or are altered or repealed by the general assembly." Schedule, §1. At and prior to the adoption of the constitution, such instrumentalities of government as sheriffs and county assessors existed, whose functions and duties were defined by statute and frequently changed and modified thereby. As the constitution is not a grant but a limitation of power, and the duties of such officers were defined by statute prior to its adoption, and the constitution schedule continued such duties in force" until they were altered or repealed by the general assembly"; can there be reasonable doubt of the legislative authority in the premises? Moreover, this view is fortified by legislative construction and long acquiescence of the people therein, as evidenced by the acts creating the office of bailiffs for our district courts and jury commissioners in various counties, thus taking away from the office of sheriff powers and duties existing in, and pertaining thereto, prior to the adoption of our constitution. We have no doubt as to the soundness of our conclusions. The judgment here involved is, therefore, re-

versed, the cause remanded, the injunction ordered dissolved, and the suit dismissed.

Decision En Banc.

Mr. Justice Cabbert, Mr. Justice Hill and Mr. Justice Garrigues dissent.

And the opinion herein referred to is in words and figures as follows, to-wit:

76 No. 8200.

THE PEOPLE OF THE STATE OF COLORADO ex Rel. THE STATE BOARD of Equalization and The Colorado Tax Commission, Petitioner,

v.

CLAIR J. PITCHER, Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Respondent.

Original Proceeding in Mandamus.

Hon. Fred Farrar, Attorney General;
Mr. Norton Montgomery, Asst. Atty. Genl.;
Mr. Frank C. West, Asst. Atty. Genl.; for Petitioner.
Mr. I. N. Stevens,
Mr. Geo. Q. Richmond,
Messrs. Benedict & Phelps, of Counsel for Respondent.
Messrs. Rogers, Ellis & Johnson,
Mr. Pierpont Fuller, of Counsel, Amici Curiæ.

Mr. Justice WHITE delivered the opinion of the Court:

77 Upon application of The People, ex rel. The State Board of Equalization and The Colorado Tax Commission, we assumed original jurisdiction of the matters here involved, and issued the alternative writ of mandamus directed to respondent Pitcher, as Commissioner of Finance and ex officio Assessor of the City and County of Denver, commanding him to make, as directed and ordered by the Colorado Tax Commission and also by the State Board of Equalization, a certain increase in the valuation of the assessment of the real and personal property of the City and County of Denver as returned in his abstract of assessment for the year 1913, or to show cause within a day named why he had not done so.

The pleadings disclose that the county assessors within and for each county of the state, filed with the Colorado Tax Commission, as required by law, abstracts of assessment of property within their respective counties for the year 1913; that the Tax Commission thereupon determined that in fifty-eight of the sixty-three counties of the state the valuations fixed by the several assessors, and set forth in such abstracts of assessment, were below the full and true cash value of the property so assessed. It thereupon examined all

such abstracts of assessment and secured information for the purpose of ascertaining the changes and increase necessary to cause such property to appear on the assessment rolls at its full cash value, made and entered findings in that respect, and ordered and directed the several county assessors, including the respondent, to make the required change in their respective counties. In the City and County of Denver, the increase made and ordered upon the valuation as returned by the assessor, was 40%, or, approxi-
78 mately, $102,000,000., and in the entire state approximately $187,000,000. over and above the valuation returned by the several county assessors.

The Tax Commission thereupon reported its action in the premises to the State Board of Equalization, in session for the purpose of equalizing assessments among the several counties of the state. That Board made no changes, but adopted the findings of the Tax Commission, fixed the levy of taxes for state purposes, and certified its action in the premises to the Tax Commission and the several assessors of the state. Thereafter, the Tax Commission, by an order made and entered, recited the action of the State Board of Equalization in the premises and the levy fixed for state purposes, and again ordered and directed the assessors of the several counties, including the respondent, to make the specified increase by adding the amount which the former had found necessary in each county to make the assessment of the property therein of full cash value. The State Auditor likewise certified to the clerk and recorder of the City and County of Denver that the State Board of Equalization, convened and in session for that purpose, had, on the 20th day of October, 1913, fixed the rate of tax at 1.3 mills to be levied and collected within the various counties of the state for state purposes for that year, and, among other things, had, by resolution duly adopted, increased the valuation of the real and personal property of the City and County, as hereinbefore set forth, as having been made and ordered by the Tax Commission.

The return of the respondent to the alternative writ challenges the sufficiency of the facts to state a cause of action; alleges
79 that the assessment made and certified by him is the full and true cash value of the property assessed, except that since transmitting his abstract to the Tax Commission he has increased the valuation of the assessable property within the City and County of Denver a little more than $8,000,000.; that the Tax Commission and the Board of Equalization each exceeded its jurisdiction in the premises; that the valuation of the property as determined by the Commission was greatly in excess of its true value, and that the statutory provisions under which the Tax Commission and the Board of Equalization pretended to act are unconstitutional.

The record discloses that in making, ordering and directing the increase in the valuation of the assessable property over that as returned by the assessor, the State Board of Equalization and the Colorado Tax Commission duplicated each other's acts. It, therefore, follows that if the acts performed constituting the increase,

fall within the powers conferred upon either body, the increase must be sustained; otherwise declared non-effective. In determining this question it is also essential to consider the powers and duties of county assessors and county boards of equalization; and in doing this a construction must be placed upon the acts of the General Assembly, if possible, so as to render them consistent with each other and in harmony with the fundamental law. Moreover, as the power of the legislature to enact laws and prescribe the procedure for raising revenue to support the government, is plenary, except as limited by the inhibitions of the Federal and State Constitutions, no act of that department will be declared invalid unless its repugnance to the fundamental law is clear and beyond
80 reasonable doubt. The judicial department is not invested with legislative power and can not arrest acts of legislation within constitutional bounds, even though, in the judgment of the court, such acts be unwise.

Newman v. People, 23 Colo., 300, 306,
Wadsworth v. U. P. R. R. Co., 18 Colo., 600, 612,
Cooley's Const. Lim., (6th ed.), Chap. 7.

In People, ex rel. v. Henderson, 12 Colo., 369, 371, Mr. Justice Helm well expressed this rule in the following language:

"We also bear in mind the familiar principles that, except as controlled by constitutional limitation, the authority of a state legislature in enacting laws is plenary, and that, unless there be a clear and positive repugnancy between a statute and a constitution, the statute must be upheld."

And in Ames v. People, 26 Colo., 83, 109, after quoting with approval this language of Mr. Justice Helm, we said:

"In numerous other cases this rule of construction has been approved by this court, but it is not necessary to cite them here, as it has become firmly established in this jurisdiction."

See also State, ex rel. v. Daniels, 143 Wis., 649, 653, where the rule is aptly expressed in the following language:

"It is elementary law that an act of the legislature will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt. * * * Equally well settled and as oft reiterated is the other rule that 'the legislature has plenary power over the whole subject of taxation within constitutional limitations.'"

Keeping in mind these elementary rules of construction and directing our attention to the state constitution, we find that it commands the General Assembly to provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year. It declares that all taxes shall be uniform upon the same class of subjects within the
81 territorial limits of the authority levying the tax, and shall be levied under a plan which shall secure a just valuation for the purposes of taxation. It exempts some, and prohibits the exemption of other property, from taxation. It inhibits the General Assembly from imposing taxes for the purposes of any county, city

or other municipal corporation, but authorizes it to invest the corporate authorities thereof with the power to assess and collect such taxes, and limits the rate of taxation on property for state purposes. Const., Art. X, §§ 1 to 11 inclusive. To attain this end it creates certain governmental agencies, and under the general power of legislation, inherent in the General Assembly as well as by express provision of the constitution, authorizes the creation of others. A county assessor is required to be elected in each county every two years. Const., Art. XIV, § 8. A State Board of Equalization is constituted, and, in each county, a County Board of Equalization is provided for. Of these agencies, however, the state and county boards of equalization alone are expressly invested with constitutional duties, and even they, may be required to perform other duties by legislative enactment. Const., Art. X, § 15.

The constitutional duty imposed upon the State Board of Equalization is to adjust and equalize the property values among the several counties of the state, and that upon the several county boards to adjust and equalize such values within their respective counties. These duties having been imposed upon these agencies by the constitution, the General Assembly is powerless to take them away or confer them upon another. In People, ex rel. v. Lothrop, 3 Colo., 428, it was held that the constitutional section creating the State Board of Equalization and prescribing certain duties for it to perform does not give it power to raise the aggregate values previously ascertained by the county officers; and that the statutes then in force did not purport to confer that power. Ames v. People, 26 Colo., 83, 96. It was further held therein that the term "valuation" as found in the constitutional section "imports values already estimated and fixed and must be referred for the measure of its force and meaning to the mode prescribed by law for estimating and fixing valuations. The aggregate material with which the board can deal is thus limited; they may adjust and equalize valuations among the several counties, but they cannot add to its volume." So it follows, as held therein and also in People v. Ames, 27 Colo., 126, 131, that the State Board, in equalizing and adjusting values, must deal with the respective county valuations as entireties. Under this rule it necessarily follows that the aggregate material with which the several county boards of equalization can deal is also limited and confined, when exercising the constitutional powers imposed, to the values already ascertained and fixed by the instrumentalities provided and empowered by the legislature to primarily ascertain and fix such values. By this means is effectuated the constitutional requirement that all taxes be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and be levied under a plan which shall secure a just valuation for the purposes of taxation. But there is no constitutional requirement that taxes be levied under a plan which shall secure a full valuation and, therefore, a valuation, however low, which is equal and uniform, is a just valuation and meets the constitutional requirement. However, as the taxing power is vital to the functions of government, and the duty

82

83

is constitutionally imposed upon the General Assembly to provide by law for a state tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year, and the rate of taxation on property for state purposes is limited by the constitution to not exceed four mills on the dollar of valuation, it may become of imperative necessity to the very existence of the state government and its institutions that property be assessed according to its full cash value, and unless there be a constitutional inhibition, it lies within the power of the General Assembly to provide the plan necessary in its opinion to effectuate that result.

In People, ex rel. v. Lothrop, supra, it was held that the statutes then in force did not purport to confer upon the State Board of Equalization the power to raise the aggregate values of property previously ascertained by the county officers, and that if such power was conferred by statute it would constitute that body a board of assessors with power to fix and determine values as well as to adjust and equalize valuations. At the time of that decision the statutes provided that all property, both real and personal, within the state not expressly exempted by law, should be subject to taxation; that all taxable property should be listed and valued each year and be assessed at its full cash value; and provided a complete plan whereby county assessors should list, value and assess such property at such value. Moreover, it required each assessor to take an oath and attach the same to his assessment rolls to the effect that he had made diligent inquiry and examination to ascertain all the property within his county subject to taxation; that he has assessed it equally and uniformly, according to his best judgment and information and belief, at its full cash value; that he had faithfully complied with all duties imposed on the assessor by the revenue laws; that he had not imposed any unjust assessment through malice, nor allowed any one to escape a just and equal assessment through favor. §37, G. L., p. 754. These statutes constituted a complete scheme whereby the county assessors primarily made the assessment in the respective counties. Nevertheless, the legislature, evidently recognizing the constitutional limitations of the state and several county boards of equalization, wisely provided (§38, G. L., p. 754), that the latter bodies, in their respective counties, should correct and complete the assessment rolls, and, to that end, might supply omissions therein, and in equalizing the same, might increase, diminish, or otherwise alter and correct any assessment or valuation. In fact, as said in People, ex rel. v. Lothrop, supra, the statute "constitutes them a quasi court to hear any and all complaints of the tax payer touching the valuation or listing of his property, with full power to adjust and correct the assessment roll as in their judgment they may deem proper and right, thus adding statutory duties to their constitutional duty 'to adjust and equalize.'"

84

Clearly, if as said on page 462 of that opinion, *if* the power to raise the aggregate values of property previously ascertained by the county officers was conferred by statute upon the State Board of Equalization, it would constitute that body a board of assessors with

power to fix and determine values as well as to adjust and
85 equalize valuations, then by §38, G. L., p. 754, supra, when similar power was conferred upon county boards of equalization they were thereby constituted boards of assessors within their respective counties. But, it is said that as a county assessor is a constitutional officer, though his duties are left unprescribed in that instrument, the General Assembly is impliedly inhibited from authorizing any other officer to perform any of the duties or functions of assessment. Some courts have held that where the constitution designates an officer to be elected for a definite period without defining his duties or making specific provision therefor, and such office was known at common law, that thereby such officer acquires a right, of which the legislature may not deprive him, to the exercise of the powers which have immemorially attached to the office. However, the rule is by no means universal, and as far as we have been able to ascertain has been confined exclusively to well known common law officers, such as constable, coroner and sheriff. Moreover, the rule, even as to such officers, does not seem to be logically supported. In State v. Dews, determined by the Superior Court of Georgia, Charlton's Reports, p. 397, this question is considered at length. The constitution of that state established the tenure of the office of sheriff, but imposed no other limitations upon the power of the legislature in relation to it, and it was held that by the silence of the constitution as to the duties pertaining to that office, it submits them "to the direction and control of that department of the government, which is invested with the power of making all laws which are not repugnant to" the constitution. Further on in the opinion, the court said:

86 "But it is said, that the word 'Sheriff' is known to, and derived from the laws of England, and that by its adoption into our Constitution, the nature and character, the powers, duties and rights of that office, as it existed under those laws, became fixed and established, by the fundamental law of the State, beyond the reach of legislative alteration, and that as by the common law, and the statutes 14 Edward III, c. 10, and 19 Henry VII, c. 10, the Sheriff has the custody and keeping of the jail, and of the prisoners therein, that custody is by the Constitution, embraced in the office of Sheriff, and cannot be separated from it by legislative Act. If the premises assumed be, that the term 'Sheriff' has been introduced into our Constitution, according to its strict etymological sense, and as importing what it originally signified at common law, 'the keeper of the county,' with the authorities and dignities attached to the station, as the associate of the King, the chief executive and military officer of the county, invested also with high judicial powers, whose office was purely honorary, and whose duties were gratuitously discharged, it must be obvious that they are incorrect, if in fact, they be not repugnant to the genius of our institutions; while also, it must be equally apparent, that by parity of reason, Justices of the Peace will be protected, by constitutional safeguard, in the same tenure, jurisdiction, powers and incidents, which belong to those officers, in the country from which the Constitution has derived their

designation. And the reason why the corollary deduced from these premises is untrue, will furnish an answer to the argument that has been built upon them. It is, that they are officers created by law, whose duties, powers, and responsibilities, are, and always have been, regulated and controlled by law. * * * The administration of justice, the pursuit of rights, and the redress of wrongs; all laws which are administered through judicial tribunals, all which relate to property, to contracts, or persons; and these form the great mass of the laws of every civilized community; the whole criminal jurisprudence of the country, and every thing connected with the enforcement of civil rights, require the agency of the office of Sheriff in England, or of an officer of like nature and character, in every country where laws and courts of judicature are known—and are, therefore, immediately connected with his powers and duties. If then, the powers and duties of the Sheriff, as they exist in England, are surrounded by the impregnable safe-guard of the Constitution, the laws of that country, almost in their totality, have been inflexibly fixed upon us; they cannot be changed, since any change in them, must affect the Sheriff in his powers or duties, his rights or responsibilities, and make them different from what they were in England, at the period of the establishment of our Constitution; and the framers of it, when ordaining a government, in which they embodied the representative principle, in order that it might reflect the sentiments of the community, and with the distinct de-
87 sign, that the political society, which they are organizing, should advance with the advancement of the age, and accommodate itself to the improvements of society, have, with the iron hand of an imbruted despotism, stamped inflexible immutability upon our institutions; have bound us to the notions of our ancestors, no matter how exploded by the sentiments of society, or inconsistent with the interests; and not merely limited, but abolished the power of the Legislature, in the very effort to organize it. The proposition is too monstrous to be for a moment entertained.

If it be true; the contemporaries of the Constitution and those who, themselves, had an agency in framing it, have betrayed a lamentable ignorance, or been guilty of a wanton disregard of its provisions, by divesting the Sheriff of the high judicial and executive powers which belonged to him in England and degrading him to the performance of unmixed ministerial services; by transferring from him the authority of presiding at elections and imposing on him the duty of attending them as a mere police officer, subject to the orders of others who preside; by depriving him of the important privilege of selecting jurors; by admitting constables, not of his nomination, to participate with him in the service of writs; by all the regulations in relation to Sheriff's sales, and by the inforcing upon him of the duties of humanity towards prisoners whom the common law allowed 'in the name of God' to starve, if they could not support themselves; by requiring from him a bond, as a prerequisite to the discharge of his duties, and by numberless other interferences with his powers and privileges; nay, by the Judiciary Act itself, passed almost simultaneously with the Con-

stitution, and whose provisions the defendant invokes in support of his claims;—and not only by the Acts which have direct reference to his office, but also by all those which regulate Courts and their proceedings."

However, it is said that the framers of the constitution, when they employed the term "assessor," necessarily had in mind the officer, whom it designated, in the light in which he was known to the inhabitants of the territory. In this view we concur, but it does not follow therefrom that the duties pertaining to the office may not be changed and modified in some respects. The territorial laws recognized the assessor, from the beginning, as an agency in raising public revenues, whose duty was prescribed by legislative enactment, frequently changed, and always subject to
88 legislative control. The employment of the term in the constitution, therefore, so far from relieving his duties from the control of the legislature, imports their subjection to the legislative will in the formation and adoption of regulations that will secure a just valuation of property for the purposes of taxation. Though the office can not be destroyed by the legislature, that agent may, nevertheless, not being restricted in this respect by the constitution, direct and provide that the work of such office may be corrected, supplemented or reviewed. While Savings and Loan Society v. Austin, 46 Calif., 415, was overruled in Houghton v. Austin, 47 Calif., 646, as pointed out in Ames v. The People, 26 Colo., 83, 92, certain language found in the overruled opinion is so pertinent to the question now being considered that we are constrained to adopt it. It is there said, on pages 474, 475 and 476:

"The argument for the plaintiffs is, that at the time of the adoption of the Constitution, the term 'Assessor' had a definite and well understood meaning, importing that he is an officer appointed or elected to ascertain and determine the value of property for the purposes of taxation; and that in requiring such an officer to be elected in each 'district, county, or town in which the property taxed for State, county, or town purposes is situated,' the inference is necessarily implied, not only that he is to make the valuation, but that, when made, his determination as to the value is final; and that the valuation cannot be changed, altered, or in any respect modified, unless possibly by some superior Board or officer, to be elected for that purpose by the electors of that district, county, or town. In support of this view, we are referred to the fact that this provision is peculiar to our Constitution; and, it is claimed, was inserted ex industria in deference to the wishes of the native Californians, who were then the proprietors of large landed estates, and were apprehensive that unless the valuation for taxing purposes should be made by local Assessors, to be elected by the
89 people of the district, the burdens of taxation might be imposed chiefly on their lands and herds, to the exclusion of other property.

Whatever weight may be due to this argument, it can hardly be deemed of such conclusive force as to preclude an examination of other provisions of the Constitution in order to determine whether

the construction now contended for would not or might not be subversive of one of its fundamental principles. As already stated, the governing rule ordained by the Constitution—the central idea which pervades that instrument in respect to taxation—is that it shall be equal and uniform, and that property shall be taxed in proportion to its value.

As one of the necessary steps towards ascertaining its value, local Assessors must be elected, who shall make the primary valuation. But there is nothing in the instrument to indicate that this valuation was intended to be final. On the contrary, it is expressly provided that the valuation is to be ascertained 'as directed by laws' —which is an explicit recognition of the power of the Legislature to provide appropriate methods for ascertaining the value, subject only to the limitation that the primary valuation shall be made by local Assessors to be elected by the people of the district. It may be further observed that, when the Constitution was adopted, the term 'Assessor' was not understood as defining an officer whose valuations were to be necessarily final. On the contrary, from the earliest period in our American jurisprudence, Assessors had been employed in almost every State for the purpose of making the primary valuation of property for taxation, and in none of them, so far as we are advised, was this valuation final, but was subject to correction and alteration by some supervisory Board or officer. In employing the term 'Assessor' the framers of the Constitution must be understood to have used it in this its popular sense."

In Ames v. The People, supra, these California cases were reviewed and Houghton v. Austin was held inapplicable as an authority under our constitutional provisions. Moreover, while the doctrine of Savings and Loan Society v. Austin was not directly approved, it was held that in this state "the sole power of fixing values is not vested in the assessors by the constitution." While we there declined to say how far the General Assembly might go in taking from county assessors the power to assess property for taxation,

we did hold, substantially, that construing §8 of Art. XIV,
90 creating the office of county assessor, in connection with §8 of Art. X of the Constitution, which enjoins upon the General Assembly the duty of providing by general law such regulations as shall secure a just valuation for taxation of all property, and bearing in mind that §7 of the same article expressly permits the General Assembly to vest in corporate and municipal authorities power to assess and collect taxes for all their purposes, the General Assembly was not inhibited from enacting laws authorizing the assessment of certain classes of property by some other tribunal or board, if, in its wisdom, it determines that there a just valuation of such property may best be secured, and if the act on its face is not palpably ineffectual to accomplish that object. The same rule that the sole power of fixing values is not lodged by the constitution in county assessors is also recognized in People, ex rel. v. Lothrop, supra. As the statutes then existed it was pointed out that the only exception to the power of the county assessor and the county boards of equalization in respect to assessment, was

the express statutory provision for the assessment of railroad property by the State Board of Equalization. And it is said: "For this, in the opinion of the legislature, there was, doubtless, an obvious necessity and authority." So here, we decline to hold how far the General Assembly may go in that respect. Nevertheless, in view of the constitutional provisions hereinbefore mentioned and to which reference will again be made, we are certain the legislature may adopt a plan whereby the work of assessors may be corrected, supplemented, added to or changed. Thereby that which
91 the assessors were previously authorized to do by law need not be taken away but those agencies may still be left free to perform those functions. Furthermore, this view is strengthened by the legislative construction long acquiesced in as evidenced by the act imposing upon county boards of equalization the powers and duties, as hereinbefore pointed out, of raising or lowering valuations returned by the assessor, even though it may greatly augment the total valuation of the count.

Peculiarly applicable on this point is certain language from an opinion of the Court of Appeals of Kentucky in a case determined under a constitutional provision requiring the election of a county assessor for a definite period, but silent as to his duties. In that case, Spalding v. Hill, 7 S. W., 27, 28, it is said:

"The constitution of the state requires that a county assessor shall be elected every four years; but his duties are not prescribed by that instrument; his duties were wisely left to be prescribed by law. It is conceded that, 'in all cases of taxes by valuation, an assessment is indispensable and primary; it lies at the foundation of the proceeding.' But the action of the assessor in making the assessment is not necessarily final. His action in ex parte. It is true that the law authorizing the assessment may make his action final; but it is not necessarily final by virtue of his office. From the earliest history of the state, assessors have been employed for the purpose of making the primary valuation of the property in the several counties of the state; but at no period in the history of the state has the action of the assessors been regarded by the law making power as necessarily final; for laws have been passed time and again, creating county boards of supervisors, with the power to increase or decrease the value placed upon the citizens' property by the assessor."

And equally applicable is that from State of Wisconsin,
91½ ex rel. Brown County v. Meyers, Judge, etc., 52 Wis., 628, 632, where, in considering a statute authorizing the appointment of three discreet freeholders, not residents or owners of real estate in the county, to review the aggregate valuations made by the county board of the taxable property in the several towns, villages, and cities of the county, it is said:

"The law is evidently in furtherance of justice and fairness in the equalization of values, and does not seem open to any constitutional objection; for this whole matter is within the control of the legislature, which, doubtless, might abolish the present system and create a state board for the assessment and equalization of the

value of the taxable property of the state. At all events, such a law would be within the constitutional power of the legislature. Therefore the legislature may change the existing method and adopt one better calculated to insure greater uniformity and fairness in the assessment and equalization of the taxable property of the state, when such a method can be devised. A fair valuation of property constitutes the very basis for the apportionment of a tax, and is the main object to be secured in all legislation upon the subject."

In Board of State Tax Commissioners v. Board of Assessors, 124 Mich., 491, 494, 496, the constitutionality of a statute creating a tax commission to supervise the assessment roll of the assessors, was under consideration. The court therein used the following pertinent language, to-wit:

"It gets down, then, to the question whether the exclusive agency for making such assessments is, under our Constitution, some officer of the municipality, whose acts are final and conclusive as well to the State as to the municipality; for it is to be kept in view that, both at the time of the adoption of the Constitution and at the present, the taxes levied for State purposes are based on the same assessment as are those collected for local use. * * * The State is concerned in the proper assessment of property, not only as to its own interests as they are affected by the collection or
92 failure to collect the funds necessary to carry on government, but, as the supreme authority in the State, the legislature, is required by section 12, art. 14, of the Constitution, to see to it that assessments be made on property at its real value. We think that the authority of the legislature is not so restricted as to preclude the use of a State board in carrying into effect this important constitutional provision. * * * It is suggested that inasmuch as section 13, art. 14 provides for a State board of equalization, this excludes the right to authorize such a board as the board of State tax commissioners. This is based upon the claim that the board of equalization is in one sense an assessing board; but an examination of this act discloses that none of the duties of the State board of equalization are interfered with in any way."

In the light of these decisions, and bearing in mind the constitutional duty imposed upon the General Assembly to provide by law for a state tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year; the constitutional limitation of the rate of taxation on property for state purposes, the necessity for uniformity, and the constitutional mandate that taxes shall be levied under a plan which shall secure a just valuation for the purposes of taxation, it would seem that there should be no doubt as to the power of the General Assembly to create a central body and empower it with the duty of performing those functions of assessment in each county essential to bring the property therein for taxation purposes to its full cash value, the standard by it prescribed to insure a just valuation. Such laws would in no wise interfere with the constitutional powers of the state or county boards of equalization, and would be, in

effect, the same power previously conferred by statute, §38, G. L., supra, upon county boards of equalization.

Indeed, almost every state in the union has provisions, either in its constitution or statutes, authorizing some central body to
93 examine into the assessment of the several counties, and in case the assessment of one or more counties is found to be relatively higher or lower than other counties, to increase or diminish such assessment, even though the effect be to greatly increase the aggregate of the total assessments from all counties.

Wallace, et al. v. Bullen, 6 Okla., 17, and on rehearing p. 757, overruling Gray v. Stiles, 6 Okla., 455,

State, ex rel. v. Thomas, 16 Utah, 86; 50 Pac., 615.

Indiana has a state tax commission law very similar to ours. A number of cases have been tried there involving the constitutionality of the act, and it has been uniformly upheld. In C. C. C. & St. Louis R. W. Co. v. Backus, 133 Ind., 513, 536, it is said:

"As to the latter clause of the section of the constitution providing that the General Assembly 'shall prescribe such regulations as shall secure a just valuation for taxation', it leaves it to the Legislature to prescribe the mode by which the valuation of all property shall be ascertained, enjoining upon them the one obligation to provide such regulations as shall secure a just valuation."

The State of Arkansas has also, by statute, created a state tax commission and conferred upon it the general supervision of the assessment and collection of taxes, and over the county assessors and other officers, and given it the power to revise the action of such officials. The constitutionality of the act has been sustained. See Bank v. Tax Commission, 123 S. W., 754.

We find nothing in our constitution, either directly or by necessary implication, which inhibits the legislature from creating such a body and investing it with such power, nor do we find anything in the decisions of our courts to prevent it. While in People, ex rel. v. Lothrop, supra, it was said, in view of the fact that a
94 county assessor is a constitutional officer, and of other constitutional provisions, that "it may be gravely doubted whether it is competent for the legislative authority to take from county assessors the substantial control of valuation of property for State taxation, and vest it in a central authority", the matter was not determined. On the contrary, the court expressly said, that "The question here presented is not what the legislative authority could do in this respect, but what it has done." And in Re Assessment of Property, etc., 25 Colo., 296, wherein we had under consideration certain interrogatories propounded to the court, including one as to the power of the State Board of Equalization to increase the aggregate assessed valuation as returned by the county assessors, we expressly stated, that as the General Assembly had not seen fit to exercise the power claimed to be inherent, by passing a law authorizing the State Board of Equalization to perform such functions, we would not review the powers of that board as determined in the Lothrop decision. However, when the In Re

Assessment case was before us, Judge Elliott, who had previously, for many years, been an honored and able member of this court, filed as brief an amicus curiæ, and in discussing the doubt expressed in the Lothrop case, as to the authority of the General Assembly, under the Constitution, to create and invest a central body with power to increase the aggregate valuations returned by the several county assessors, said:

"While in this brief no special effort is made to controvert the doubt thus expressed in the Lothrop case, for the reason that the legislature has not attempted such legislation, we do not for one moment doubt the power of the legislature to pass general laws which shall be effectual to secure 'a just valuation for taxa-
95 tion of all property, real and personal' even though the result might be the increasing of the average valuation of the county assessors. It would be a strange conclusion to hold that the legislature has not the power to pass such laws and prescribe such regulations as the constitution expressly provides shall be passed to carry into effect its essential guaranties." Supreme Court Briefs, Vol. 166.

Nor do we consider that what was determined, or the language found in Taxation of Mining Claims, 9 Colo., 635, in any wise militates against the views herein expressed. As pointed out in Ames v. The People, supra, the only question in that case was as to the constitutionality of certain bills before the General Assembly for taxing mining claims, and the only point calling for a decision was whether or not the General Assembly itself could assess property for the purposes of taxation. In holding that it could not the court added that, in general, the valuation of property for taxation must be ascertained by the county assessors. But it is further said in the Ames case that, "The remark of the court that, in general, property is to be assessed by the county assessors, was not at all necessary to the decision, nor was there any intention to announce the rule that railroad property was to be assessed by them only."

Having determined that the General Assembly may create a central body and confer upon it general supervision of the assessment and collection of taxes, and likewise over officers authorized by statute to perform such functions, we will advance to a consideration of the pertinent provisions of the statutes of this state creating and defining the Colorado Tax Commission under which, if at all, the increase ordered in the assessed valuations here involved
96 can be upheld.

Chapter 216 of the Laws of 1911 created the Colorado Tax Commission and defined its duties, This act in some particulars was amended in 1913, S. L. p 525. Sub-division 1, §13 of the act of 1911, p. 615, purports to invest the Tax Commission with authority to cause all property of every kind or character to be assessed at its actual and full cash value, and, to that end, confers upon it general supervision over the administration and the enforcement of all laws for the assessment, levying and collection of taxes, and like supervision over the county officers, boards of county commissioners, county boards of equalization, and all other

officers and boards of assessment, levy and collection. The supervisory power here conferred can, of course, not be exercised to the extent of unduly interfering with constitutional duties imposed upon any such officers or boards, and if any clause of the statute can not be so construed, it is necessarily invalid in that respect, but this would not overturn its other provisions. It can not be doubted that the primary and manifest purpose of the act is to place in a central body authority to bring the valuations of taxable property to the legislative standard of full cash value. In the exercise of the power conferred at least two methods are prescribed whereby the central body may bring about the desired result. One method is provided for by subdivision 6 of §13, supra, and the other by §31 of the act. By the former method certain statutory powers of county boards of equalization are necessarily taken away, for the Tax Commission is authorized thereby to reappraise classes of property within counties; to increase or diminish the values placed thereon by county assessors; and to require omitted property therein to be placed upon the assessment roll. Indeed §5638
97 R. S. 1908, pertaining to the increase or decrease of valuations by County Boards of Equalization, was expressly repealed by §12, Chap. 134, S. L. 1913. By the other method the Tax Commission may deal with the aggregate values of the several counties as primarily fixed by the county assessors or equalized by the county boards of equalization. The method prescribed by subdivision 6 of §13, supra, is to be applied to the property of individual tax payers, and is evidently intended to be exercised when the Tax Commission is of the opinion that the primary assessment made by the assessor has omitted property subject to taxation or has placed upon the property of certain individuals a value higher or lower respectively than that placed upon the property of other individuals and is unwilling to leave the matter solely subject to the action of the County Board of Equalization. On the contrary, the method prescribed by §31 is to be applied to, and upon, the aggregate value of all the property in the county, and is evidently intended to be exercised when the Tax Commission is of the opinion that the primary assessment and valuation of property made and fixed by a county assessor is relatively equal as among the property owners therein, or will be corrected, in that respect, by the county board of equalization, in whom is vested final power in that regard. Moreover, the power invested by subdivision 6 of §13 can only be exercised prior to the action of the county board of equalization, to the end that it may perform its constitutional duties to adjust and equalize the property values within the county as between classes of property therein and owners thereof. But, as that board has only the constitutional power to adjust and equalize, but not to increase the aggregate values within the county, it would seem that
98 it is wholly immaterial whether the action of the Tax Commission, under the method prescribed by the latter section, was exercised before, or after, the action of the county board of equalization. In any event, the rate of increase and the relative

effect on property owners would be the same. This would also seem to be the legislative view as evidenced by the dates prescribed for the different meetings of the county board of equalization, and the limited time in which the Tax Commission may exercise the power conferred upon it by §31.

This view is further fortified by other provisions of the act. Subdivision 7 of §13 provides for the giving of notice to the owner of property and fixing a time and place for a hearing. This notice, however, applies only in cases where the Tax Commission is exercising its power under the procedure prescribed by subdivision 6 of the section, and does not apply when a horizontal increase or decrease by a designated rate per cent. or amount to be added is ordered by the Tax Commission under the provisions of §31. This is conceded by all parties to the controversy, and it is upon this assumption that respondent has interposed, as a defense, the constitutional provisions inhibiting the taking of property without due process of law. To this contention there are many sufficient answers: As said in Turpin v. Lemon, 187 U. S., 51, 57, 58:

"Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. * * * But laws for
99 the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary."

Moreover, under the law as it existed prior to the adoption of the Act of 1911, and as it now is, the State Board of Equalization is required to meet at a certain place, on a certain day, and to complete its labors by another day. It has never been questioned that such Board has the right, without further notice than that implied by the law, to equalize valuations of the property among the counties by raising the valuation in one or more and reducing it in others. The only question that has been raised is as to whether the aggregate valuation of the counties might be increased. But whether the aggregate is increased or not, the same legal principle is involved, because equalizing under any system, if there be change at all, necessarily raises the valuations in some county or counties. This affects the valuation of the individual property owner, yet at no time in the history of the state was it ever provided or assumed that he was entitled to a specific notice or hearing. However, the rule is settled by numerous authorities that actual notice to the individual tax payer is not required as a condition precedent to action by state boards of equalization, notwithstanding such boards may exercise the power of increasing or decreasing the aggregate valuations as returned from the respective counties. The rule is equally well settled that the only notice necessary in such cases is

the law which fixes the time and place of the holding of the meetings of such boards.

McGehee on Due Process of Law, pp. 232, 238,
Cooley on Taxation, (3rd ed.), pp. 53, 55.
100 State v. Armstrong, 56 Pac., 1076, (Utah),
State Railroad Tax Cases, 92 U. S., 575,
Territory v. Bank, 10 N. M., 283,
McMillen v. Anderson, 95 U. S., 37, 41,
Hagar v. Reclamation Dist., 111 U. S., 701,
Kelly v. Pittsburg, 104 U. S., 78, 79,
Kentucky Railroad Tax Cases, 115 U. S., 321,
Carrico v. Crocker, 133 Pac., 181, (Okla.).

In State Railroad Tax Cases, supra, in speaking upon this subject, it is said:

"The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet, if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

So in Suydam v. Merrick Co., 19 Nebr. 155; 27 N. W., 142, Mr. Justice Cobb, speaking for the court, said:

"When complaint is made that a certain individual is assessed too low, then it is a condition precedent to action thereon by the board, that such individual owner have notice of such proceeding. But the increase of the assessment of a precinct is not made upon any one's complaint, but arises in the official mind and judgment of the commissioners, upon an inspection and comparison of the assessment rolls of the several precincts. The law has designated no officer or person upon whom notice could be served, or to represent the precinct at such equalization. The county commissioners themselves are the only and proper representatives of the precinct, and, as they constitute the board of equalization, no notice need be served on them."

101 In Pittsburg, etc. Ry. Co. v. Backus, 154 U. S., 421, 425, Mr. Justice Brewer, speaking for the court, said:

"It is contended specifically, that the act fails of due process of law respecting the assessment, in that it does not require notice by

the state board at any time before the assessments are made final, and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice must be given at some time and in some form, before the final adjudication. But the difficulty with this argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is unnecessary. In State Railroad Tax Cases, page 610, are these words, which are also quoted with approval in the Kentucky Railroad Tax Cases:

'This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.' "

In Territory v. First National Bank, 10 N. M. 283, 303, 65 Pac., 172, it is said:

"The statute relating to the assessment of property within the county requires, that where the board of equalization or the assessor increases the valuation of property as returned by the taxpayer that notice of such increase shall be given the taxpayer affected, and the object of this notice is to give the taxpayer an opportunity to object to the altering of the assessment and to appeal if he so desires, but there is no such provision in regard to the action of the territorial board of equalization. This failure to provide for such notice was, no doubt, intentional on the part of the Legislature, because it would be both expensive and burdensome; in fact, it would be practically impossible to notify all individual taxpayers whose assessments might be affected by the territorial board of equalization, in their effort to secure the reasonable uniformity required by law. Indeed, it might happen that almost all the taxpayers of a county or the Territory might be affected by the action of the board of equalization, and it would be unreasonable to require a notice to be served upon all who might be affected by the action of such territorial board of equalization. It is reasonable to believe that the Legislature in fixing a specified date upon which this board should meet, clothed with territorial jurisdiction for the purpose
102 of equalizing the valuations of the property of the Territory, deemed this a sufficient notification to all parties interested to attend the meetings of such board, and there to look after any interests liable to be affected by the action of the board within the scope of its powers, and for that reason made no further provision for notice."

In McMillen v. Anderson, 95 U. S., 37, it is said:

"It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed, but this is not, and never has been, considered necessary to the validity of a tax."

The same doctrine was announced and affirmed in the Kentucky Railroad Case, 115 U. S., 331. It would seem, therefore, that where

such a notice has not been provided for in the laws of the state, the courts hold that the failure to provide for or give the taxpayer a specific notice, does not affect the validity of the tax. The principle declared in these cases, as to the sufficiency of notice essential to authorize equalization boards to act, applies with like force to the Tax Commission when proceeding under the provisions of §31, supra. The latter body is empowered by the legislature to cause to be added to or deducted from the valuation of the various counties the amount necessary to place upon the assessment rolls of the state the taxable property therein at the true and full cash value. Its place and time of holding meetings, like the State Board of Equalization, are fixed by statute. It is required to be in continuous session, and its meetings to be open to the public. Moreover, the assessors have until the first Monday of September in which to transmit to the Commission their respective abstracts of assessment, and the latter body is required to act under §31 on or before October 1st. So, it necessarily follows that the time in which the Tax Commission may exercise the power under the section is limited to a few days. §§9, 30 and 31, S. L. 1911, pp. 612, 622, 623.

103 Furthermore, the Tax Commission by §15 of the act, is expressly authorized to receive complaints, and carefully examine into all cases, where it is alleged that property, subject to taxation, has not been assessed, or has been fraudulently or for any reason improperly or unfairly assessed, etc. Here is an express provision for an opportunity to be heard which, with the notice given by the statute of the time and place of the meeting of the Tax Commission, surely constitutes due process of law. We think respondent does not properly interpret Gale v. Statler, 47 Colo., 72, upon which he relies. While in that case it was held that notice and an opportunity for hearing must be given a tax payer when the assessor raises the valuation of his property, the case involved the placing upon the rolls property that had been omitted, and the statute in relation thereto expressly provides that notice must be given. So, under the tax commission statutes, when complaint is made or knowledge comes to the Tax Commission that the property of a certain individual in any county is assessed improperly, too high, or too low, then it is a condition precedent, to action thereon by the Commission, that such individual have actual notice, and an opportunity to be heard as provided by the act. But, paraphrasing the language of Mr. Justice Miller in the State Railroad Tax Cases, supra, the increase in the assessment of an entire county is not made upon any one's complaint, but arises in the official mind and judgment of the commission upon an inspection and comparison of the assessment rolls of the several counties, and the law has designated no officer or person upon whom notice can be served, or to represent the county at such equalization.

104 Whosoever will, whose rights are affected, may appear at the time, and place fixed by law, and be heard if he is not precluded therefrom by prior legal proceedings in the premises. Moreover, after the Tax Commission completes its labors, and transmits its assessment to the State Board of Equalization the latter body

meets in regular session, at a place, and time, designated by statute to perform its constitutional duty of equalizing the valuations among the several counties. In that respect it is supreme, except that it can not change the aggregate of the total valuation of all the counties. It may decrease the valuation of one or more counties by raising the valuation in others and correct any inequalities in that respect.

As to the contention that all property in the City and County of Denver was valued by the county assessor at its full cash value, and that the proposed increase ordered by the Tax Commission, and confirmed by the State Board of Equaliaztion, will result in an over valuation of property, and therefore, operate as a discrimination against the tax payers of the district, in that it compels them to pay taxes on property they do not possess, in violation of the constitutional rule requiring taxation to be uniform and according to a just valuation, it is sufficient to say, that it is not conceded that the property assessed as valued by the county assessor is at its full cash value. It is conclusively presumed, however, that as between individual property owners within the county, there has been a just value placed thereon, that is, a value relatively equal. If the latter has not been done the fault lies, in the first instance, upon the assessor of the county who neglected his duty in that regard,
105 and, secondly, upon the State Tax Commission, but, finally and conclusively, upon the County Board of Equalization, possessed of supreme power in that respect. The values placed on property listed with, and assessed by the county assessor, are not conclusive and binding on the Tax Commission as being the true cash values thereof. Under the constitution and statute values of property on which taxes are to be levied, are to be determined not by the county assessor alone, but only in conjunction with other officers, and boards provided for the purpose of correcting errors and inequalities in valuations as fixed by the assessor and to bring all property values to the legislative standard. The local officers are in no wise unlawfully deprived of the right to exercise their functions. As said in State v. Daniels, supra:

"It must be remembered that, so long as the local officers obey the laws of the state they are not meddled with and their functions are in no way curtailed, and it is only when they violate the law which they are bound to obey that the state undertakes to interfere. * * * The state has a vital interest in insisting that its laws pertaining to taxation be honestly and fairly administered, to the end that the burden of taxation may be equitably distributed. * * * In order to make an equal distribution of county and state taxes it is essential that all taxable property that can be discovered be placed upon the tax rolls and that a uniform basis for valuation be adopted and adhered to. So long as the practice prevails of assessing property in different localities at figures varying from twenty-five to one hundred per cent. or more of its true value, and of doing the same thing locally for that matter, so long are we liable to have gross inequalities in the distribution of the tax burden. So the state in endeavoring to enforce the requirements

of the law in regard to the assessment and equalization of property, is not acting as a mere interloper, exercising a paternalistic function for the purpose of exploiting its right so to do, but is attempting in good faith to perform a duty in which its citizens generally have something more than a passing interest. All the state has undertaken to do is to review the work done by local officers when its proper agencies are satisfied that the law has been violated. In such a contingency the law in substance and effect provides for a reassessment of the property of the local municipality."

106 Anyone familiar with the history of taxation in this state can readily realize the purpose and necessity of the legislature enacting Chapter 216 of the Session Laws of 1911. All the statutes, adopted previous to this law, had proven inadequate to coerce the assessors to fix a full cash value, as required by law, upon the taxable property within the county. Moreover, they had likewise failed to place a relatively equal value upon the same class of property within their respective counties, and county commissioners and boards of equalization had not corrected the evil. It, no doubt, became apparent to the General Assembly that the assessment of property could not be entrusted solely to the local assessors and local boards, for the reason that such officials continually assessed property far below its real value, justifying their acts in that respect on the assertion that other counties did likewise. Indeed, history discloses that such has been the experience of many of the states of the union, and imperative necessity, there as here, has required the creation of central bodies with power to correct assessment rolls, and increase or lower the valuations placed upon property for taxation purposes by the local authorities.

It also became apparent to the legislature, no doubt, that in order to enable the state to secure sufficient revenue to carry on its functions of government, and to support its public institutions, that a new method must be adopted; a method which would not only secure a just valuation as between the tax payers of the state, but also a valuation that would be just to the state itself. Accordingly, it became manifest that full cash value is the only standard that is just and uniform, and whereby each citizen can be re-

107 quired to contribute to the support of government according to the value of his property. For, so long as the prevailing practice of assessing property in different localities at figures varying from twenty-five to one hundred per cent. of its cash value, there will be gross inequalities in distribution of the tax burden. Valuation of property for taxation is made only to secure a basis for levying taxes; and if values are raised to conform to the standard which the law has fixed, the tax levy should be correspondingly reduced. There is a common impression that increase of valuation necessarily increases the amount of taxes to be paid, and that the raise made by the Tax Commission for the year 1913 will greatly add to the tax burden of the community. This is clearly a misapprehension of the effect of the law, and of the acts of the Commission. As a concrete example, we take notice that the total valuation of property in and for the City and County of Denver,

under the assessment returned for 1912, was $133,835,040. The state mill rate for that year, including the specially authorized 1-18 mill was 4#1-18 mills, and produced a state revenue of $542,775.04. For the year 1913 the total valuation for that district, as fixed by the Tax Commission, was $402,205,614, while the state mill rate is fixed at 1.3 mills, producing a revenue of $522,867.03, or $19,-908.02 less for state purposes than for the preceding year. So, it is readily seen that it does not follow that an enforcement of the rule of full cash value as the standard for assessment necessarily increases the amount of taxes to be paid. On the contrary, it rather demonstrates that the only correct theory of taxation is to fix values at the full cash standard, the only really just and equitable one, followed by a low rate of levy. It may be true that in coun-
108 ties which have paid less than their just proportion of taxes to the state in the past, an increase will be required, and it is equally true that in those counties which have paid more than their proportion of state taxes, a reduction will follow, a result eminently fair and proper. The constitution limits the maximum of the levy for general state purposes to four mills on the dollar, and the tax levying authorities for that purpose may make it as much less as in their judgment they deem proper. What is true as to state revenue is equally true in relation to local taxation. Local officers and boards under the discretion vested in them have power to fix levies for local purposes, subject to the limitations placed upon them by law. Therefore, as valuations are increased in any district, to bring them to the true standard, proportionate reductions in levies should be made, and the burden of taxation for local purposes should not be increased. Local officers and boards are directly responsible to the people who have chosen them to carry out this important function of government. It will not be presumed, therefore, that in raising the standard of value above that which has prevailed in practice in the past, they *they* will betray their trust by seeking to raise more revenue than will meet the needs of local government. Should this be attempted the responsibility is solely with the local authorities, and the remedy is with the people. Equality and uniformity are essential to the constitutionality of taxation, and no one should complain of a law which has this for its primary and controlling object. It is, perhaps, true that in any change from one system to another some injustice and hardship will, for the time being, be imposed
109 in certain cases. But unless the standard which is provided by law, the full cash value, thus the just value demanded by the constitution, be enforced, the same unfortunate, unequal and unjust conditions which have heretofore existed in this state, will continue indefinitely.

That an unsuccessful effort was made in 1912 to amend §15 of Art. X of the Constitution, so as to create thereby a central body under the name of "The Colorado Tax Commission", and vest it with power to adjust, equalize, raise or lower the valuation of real and personal property among the several counties of the state, and to constitute for each county a county board of equalization with

like powers within their respective counties, their work, subject, however, to revision, change and amendment by the aforesaid central body, in no sense affects the validity of the statute, nor constitutes a legislative interpretation thereof. Surely, no court will assume that the legislative power enacted a law, believing it to be unconstitutional, and sought to correct its efforts at legislation in that regard by submitting a proposed constitutional amendment to a vote of the people. Neither will it assume that, because the people refused to create a central constitutional body and invest it with both constitutional and statutory powers previously invested respectively in distinct bodies, one constitutional and the other statutory, that thereby they placed a legislative construction upon a statute creating such statutory body and defining its duties. There is a vast and important difference between lodging these powers in one or two bodies. Moreover, that which the people might be willing to do by statutory enactment they might be wholly unwilling to do by constitutional pronouncement.

The fact that petitioner has sought to sustain the acts
110 here involved upon the theory that they were performed by the State Board of Equalization, and that the performance of them by the Tax Commission was only advisory to that board, is not controlling. The matters involved pertain to grave governmental functions, invested by the legislative power of the state in a particular board, and cannot be affected by the admissions of some public official or citizen, when the relief adjudged only sustains the lawful acts of that agency, and is clearly within, and warranted by, the pleadings. That such is the scope of the pleadings is manifest from an inspection of the alternative writ and the return thereto. Subdivision 6 of the former sets forth; "that the assessors of the various counties of the state on or before September 1, 1913, transmitted to The Colorado Tax Commission their various abstracts showing the real and personal property assessed by them in their respective counties and the value thereof." Subdivision 7 of the alternative writ alleges:

"That the Colorado Tax Commission, after receiving the abstracts of the various assessors of the state as aforesaid, examined each and all of said abstracts for the purpose of determining whether the real and personal property of the several counties of the state had been assessed at its true and full cash value, and that after having examined all of said abstracts and after having secured information for the purpose of determining the true and full cash value of the real and personal property of the counties of the state, said commission, on, to-wit, the first day of October, 1913, found and determined the amount of increase or decrease in the valuation of said real and personal property of the respective counties which would place said property on the assessment roll at its true cash value, and on said day issued an order to said Pitcher as assessor of the City and County of Denver, ordering and directing him to add to his valuation of property within said City and County of Denver, the amount $101,902,088 so

found necessary to be added in order to place said property
111 on the assessment roll at its full and true cash value; and that after said commission had determined upon the true value of the real and personal property of the several counties, it made a report of its actions and findings and transmitted the same to the State Board of Equalization, which said statement showed the amount to be added or deducted from the valuation of the real and personal property of each county, and which statement specified the amount to be added to or be deducted from the valuation of such real and personal property, and that said commission in determining the valuation to be placed on the real and personal property of the various counties of the state, proceeded in all respects according to the provisions of the law in such cases made and provided."

And in Subdivision 13 of the alternative writ appears the command of this Court as follows:

"Wherefore, we command you, the said Clair J. Pitcher, Commissioner of Finance and ex Officio Assessor of the City and County of Denver, Colorado, your successors, deputies, assistants and subordinates, immediately upon receipt or service of this alternative writ of mandamus, to make such additions or corrections in your assessment and assessment roll and in the assessment and assessment roll of said City and County of Denver for the year 1913 as is or may be necessary to carry out the directions of the State Board of Equalization and the Colorado Tax Commission, as you are bound to do under the Constitution and Law of the State of Colorado," etc.

Turning to §32 of the statute we find that the things herein set forth as having been done and performed by the Tax Commission are the acts and things which that body is authorized and required to do, and are, therefore, primarily its acts. However, as that which the Tax Commission orders done in the premises may be changed by the State Board of Equalization in adjusting and equalizing valuations among the counties, the order of the former does not and can not become finally effective until the latter has acted. And, in that sense that which may be enforced is the act of the State Board of Equalization. So, strictly and technically
112 speaking, the theory of petitioner is correct, as it is the order of the State Board of Equalization as the result of the exercise of its constitutional power to adjust and equalize, that is enforced by this proceeding. In other words, the valuations made by a county assessor, supplemented and modified by the act of the Tax Commission and equalized by the county board of equalization, constitute the assessment of all the property situate exclusively therein for taxation purposes, as made and returned by the officers and agents duly authorized by law so to do; and it is the values, so fixed and determined, as returned from each county, that constitute the units upon which the State Board of Equalization acts in performing its constitutional function of adjusting and equalizing among the several counties. If it approves the several returns constituting the units aforesaid, as it did in the case at bar,

it has discharged its duty in that respect, and when that is done the assessment of such property is complete. Moreover, it readily appears why the order of the Tax Commission in making a horizontal raise of the valuations in a county, should not be enforced until after equalization of values by the State Board. Should it be done prior thereto it would be an expensive and useless thing, for it might be in that particular county the State Board of Equalization would lower such valuation and make a corresponding increase in another county or counties. Why change the values by a horizontal increase or decrease until it is known there will be no further like change required? It is claimed, however, that as §1 of the act requires the Tax Commission to exercise its powers and perform its duties, subject to the direction and approval of
113 the State Board of Equalization, and §33 thereof requires the latter body to examine the abstracts of assessment as submitted by the Tax Commission, and "make a record of its action on the abstract of each county and certify the same to the county assessor," etc., the Tax Commission is only an agency of the State Board of Equalization. We are clearly of the opinion that the language in relation to that which the State Board of Equalization shall do, and its supervisory powers over the Tax Commission pertains to the exercise by the former body of its constitutional power to adjust and equalize. But, be that as it may, the force of the claim is deflected by the fact that the act of 1913, p. 525, amending the act of 1911, purports to confer upon the Tax Commission all statutory powers, duties and privileges theretofore exercised by the State Board of Equalization.

This case only demonstrates anew the wisdom of the general rule that public officials, whose duty it is to carry out statutory directions, should not be permitted to raise the constitutionality of statutes. People v. Leddy, 53 Colo., 109, 111. As said in Ames v. The People, supra:

"The reasons for this rule are apparent. Public policy and public necessity require prompt and efficient action from such officers, and when intrusted with the assessment of taxes and the collection and disbursement of the revenue, they have no right to refuse to perform ministerial duties prescribed by law because of any apprehension on their part that others may be injuriously affected by it, or that the statute prescribing such duties may be unconstitutional."

The duties of respondent, after his assessment rolls had been delivered to the county commissioners, and his abstract transmitted to the Tax Commission, were purely ministerial. Denver v.
114 Pitcher, 54 Colo., 203. Whatever confusion has arisen, or may arise, in the extension and collection of taxes growing out of the questions here involved, and whatever injustice exists between individual taxpayers, if any, by the assessment under consideration, must be attributed, ultimately, to the fact that local public officers have failed and refused to obey the mandate of the entire people of the state expressed through, and directed by, their legislative will. And were it not that the questions here determined are publici juris, we probably would not have permitted respondent to pre-

sent the alleged unconstitutionality of the statute set up in his return to the alternative writ. We are of the opinion that the Tax Commission acted within the authority conferred upon it by statute, and that the statute, as to the matters here involved, is valid. The alternative writ should, therefore, be made absolute, and it is so ordered.

Decision En Banc.

Mr. Justice Gabbert, Mr. Justice Hill, and Mr. Justice Garrigues dissenting.

115 No. 8200.

Filed in Supreme Court, Jan. 12, 1914. James R. Killian, Clerk.

Mr. Justice HILL dissenting:

I cannot agree with the conclusion. As I view it the theory upon which the action is disposed of is not involved in the case. I cannot agree that the action was brought for the purpose of compelling the respondent to comply with any order, findings or actions of the Tax Commission, save the order made by it based upon the authority of the actions and order made by the State Board of Equalization and then only in conjunction with the latter Board's actions and order. To sustain this view I call attention to the orders of both boards, copies of which are set forth in the alternative writ; they are as follows:

DENVER COLORADO, October 22, 1913.

Mr. Clair J. Pitcher, Assessor of City and County of Denver, Denver, Colorado:

We, the undersigned members of the State Board of Equalization, hereby certify:

That at a meeting of the State Board of Equalization, held on the 20th day of October, 1913, which meeting was held for the purpose of examining the abstracts of assessment of the various assessors of the State for the year 1913, as submitted to said Board by the Colorado Tax Commission, and for the purpose of taking action on said abstracts and of equalizing the valuations of the real and personal property of the counties of the State, as provided by law, and for the purpose of fixing the rate of tax to be levied and collected within the various counties of the State for State purposes, the following proceedings, among others, were had:

By resolution, duly adopted, the valuation of the real and personal property of the City and County of Denver was increased from $254,755,220, the amount returned in your abstract of assessment on property assessed by you, to $356,657,308, making an increase in valuation of your assessment of $101,902,088, the rate per cent of said increase being 40%.

And by resolution, duly adopted, the rate of tax which is to be

levied and collected within the counties of the State for State purposes was fixed at 1.3 mills.

ELIAS M. AMMONS,
Governor.
M. A. LEDDY,
State Treasurer.
FRED FARRAR,
Attorney General.
JAMES B. PEARCE,
Secretary of State.
ROADY KENEHAN,
Auditor of State."

116 DENVER, COLORADO, October 22, 1913.

Mr. Clair J. Pitcher, Assessor of the City and County of Denver, Denver, Colorado.

DEAR SIR: The State Equalization Board, at a meeting held October 20, 1913, raised the assessed valuation of the real and personal property of your county, as assessed by you, from $254,755,220 to $356,657,308, making an increase in valuation of $101,902,088, the rate per cent of said increase being 40%.

Said Board also fixed the rate of tax which is to be levied and collected within your county for state purposes at 1 3-10ths mills.

You are therefore ordered and directed to correct your assessment roll by adding the above increase in valuation and your attention is also directed to Section 3, Page 527, of the Sessions Laws of 1913, pertaining to your duties as assessor.

Respectfully,

THE COLORADO TAX COMMISSION,
By JOHN B. PHILLIPS.

Attest:
S. E. TUCKER, *Secretary.*"

It is these orders that the relators seek to have the respondent comply with and none other. The order of the Tax Commission says that the State Board, at, etc., raised the assessed valuation, etc., of your county, etc., you are therefore ordered and directed to correct your assessment roll by adding the above increase. Whyfore? Because the State Board of Equalization has ordered the value raised, etc. What increase? That made by the State Board of Equalization. It appears to me there is no escape from this conclusion. This language interprets itself. That the State Board of Equalization thus understood it is further evidenced by the notice of the state auditor to the county clerk of the respondent's county. This order is set forth in the alternative writ: it is as follows:

"October 20, 1913.

To Otto F. Thum, Commissioner of Property of the City and County of Denver and ex-Officio Clerk of Said City and County:

At a meeting of the State Board of Equalization, held on the 20th day of October, A. D. 1913, which meeting was held for the

purpose of fixing the rate of tax to be levied and collected within the various counties of the state for state purposes, the fol-
117 lowing proceedings, among others, were had:

By resolution, duly adopted, the valuation of the real and personal property of the City and County of Denver was increased from $254,755,220.00 to $356,657,308.00, making an increase in valuation of $101,902,088.00, the rate per cent of said increase being forty per cent (40%).

And by resolution, duly adopted, the rate of tax which is to be levied and collected within the City and County of Denver for State purposes was fixed at 1.3 mills.

ROADY KENEHAN,
State Auditor of the State of Colorado.

Dictated by Attorney General."

That the learned attorney general and his able assistants thus understood, it is self-evident not only by his preparing the above notice for the auditor's office, as it discloses, but by a reading of his briefs which disclose that his position is, that it was made by the State Board of Equalization and that they had a right to so do. A portion of his opening brief reads:

"The State Board of Equalization, sitting as the final arbiter to determine the valuations to be placed upon the real and personal property of the county, acted strictly within the limits of its power. It increased the valuations of the counties in such amounts and by such rates per cent as in its judgment would place the property of the state on the assessment roll at its full cash value, and under the statutes, it is the duty of said board in equalizing to take as a standard, not an average county, not any fictitious or arbitrary standard, but the true and full cash value, as its standard for equalizing valuations. Not only is this standard the requirement of the statute, but by fair implication it is the requirement of the Constitution."

In his reply brief he says:

"The only questions, as we have previously pointed out in our original brief, properly before this court are as to the powers of the State Board of Equalization in equalizing the valuations of the property between the counties; that is, first, as to whether the aggregate valuations of the counties can be increased or decreased; and, second, whether, under the provisions of our laws, due process of law is afforded the taxpayers."

The concluding paragraph of his reply brief reads:

"We feel confident that the position we have taken is the only sound one that could be taken, and, notwithstanding the comprehensive brief prepared by the able counsel of the respondent herein, we believe our position should be sustained."

It will thus be observed that the position which the learned attorney general says is the only sound one that could be taken, is not accepted by the majority; to analyze they say to him your posi-

tion is not sound and cannot be accepted, while by having
118 said that it is the only sound one, he, by inference, says to them that the theory upon which the case is disposed of is unsound. In this inference I agree with the attorney general. If his position can be construed as alleging the execution of a former order by the Tax Commission he does not ask or seek to have it enforced; the action is not brought for that purpose, but his contention is to the contrary; the reasoning is apparent and that is because there is no statute which authorizes the Commission to make such an order or any order before the State Board of Equalization performs its constitutional duty it must be conceded that without statutory authority such an order, if made, is a nullity.

In submitting what I have to say upon the subject I shall first comment upon the position contended for by the attorney general and upon the case brought by him. As it appears to me from the extracts in his brief above set forth and portion of the pleadings, the relators instituted this suit to have recognized by the respondent and other county assessors certain authority as being vested in the State Board of Equalization, while the theory of the decision is that the State Board is not possessed with this power, which decides the case brought adversely to the position taken by the attorney general but which also holds that another Board is possessed of that power, and for that reason the writ should issue. The position, if I read the briefs of the attorney general correctly, he concedes to be unsound.

I am unable to find anything in our constitution or statutes which permits of increases of values by the State Board without an attempt at equalization. As I view it, the contention that the State Board ordered these increases of values as an incident to equalization, is not supported by the record, but to the contrary it discloses that the efforts of the Board were to practically reas-
119 sess the property, in order to have it placed upon what the Board says is its true cash value; its resolution so states. It also shows that the Tax Commission purported to determine the value of the real and personal property in the several counties in the state assessed by the county assessors. This fact is thus stated in the resolution of the State Board and is followed with the declaration that it, the State Board, after having examined these abstracts, has determined the amount of the valuation of the real and personal property of each county as will place said property on the assessment roll at its true and full cash value. The declaration in this resolution that the Colorado Tax Commission determined these values in the manner provided by law is, as I view it, by the pleadings, admitted to be incorrect. Other statements in the resolution disclose beyond contradiction that the efforts of the Board were not to equalize values as between different counties but were done as therein stated, for the purpose of placing said property on the assessment roll at its true and full cash value, that is as determined by the Board. In other words, it discloses that the State Board of Equalization made an effort at reassessing the property which is not sanctioned by constitutional or statutory authority.

The alternative writ set forth the resolution of the Board ordering these raises which includes the valuation of the individual property in each county in the state as returned by the county assessors, the increases as ordered by the State Board and the total value as fixed by them. In detail this discloses that they have increased the values as returned by the county assessors in fifty-eight counties, leaving the values as fixed by the county assessors in five counties unchanged (there being sixty-three counties in the state).

120 By an examination of the auditor's report for the years 1911 and 1912 I find that the total value for the year 1912 of the property assessed by the county assessors in the five counties left unchanged by the State Board amounts to $6,127,622, while the total increase for the present year for the other fifty-eight counties as fixed by the State Board is approximately $187,000,000 and is in excess of $100,000,000 in the county represented by the respondent. These ordered increases vary from a fraction of one per cent to as high as one hundred thirty-six per cent, varying in the different counties, being forty per cent increase in the county of the respondent, and as I read the instructions of the State Board and Commission embodied in their notices to him, they mean that he must add this per cent of increase upon all the taxable property in his county which has been assessed by him, but that it does not apply to the public utility property in his county which has been assessed by the Tax Commission. When these facts are taken into consideration it is apparent that the contention that these increases were ordered as an incident to equalization becomes farcical. To better illustrate this I have set forth a copy of that portion of the resolution of the State Board adopted at its meeting upon October the 20th, covering this question. After the portion concerning the values, which is followed with the names of the counties in which no changes were made, I have set forth the value of the property assessed by the county assessor for the year 1912 in these counties, namely, Crowley, Dolores, Moffat, Park and Summit, all as follows:

"Whereas, The Colorado Tax Commission has heretofore and in the manner provided by law, determined the true value of the real and personal property in the several counties in the state and has transmitted to this Board a statement of the amount to be added to or deducted from the valuation of the real and personal property of each county; and,

Whereas, This Board has examined the abstracts of assessments of each county of the State of Colorado, as submitted by the Colorado Tax Commission; and,

121 Whereas, This Board, after having examined said abstracts, has determined the amount of the valuation of the real and personal property of each county as will place said property on the assessment roll at its true and full cash value.

Be It Therefore Resolved, and it is hereby determined that the valuations of the various counties of the state as returned and shown by the respective abstracts of assessment of the respective assessors of the counties of the state be increased or decreased as follows:

County.	Valuation by assessor.	Increase by St. Bd. of Equalization.	Total as fixed by St. Bd. of Equalization.
Adams	$17,190,930	$27,321	$17,228,251
Alamosa	1,061,719	1,510,626	2,572,345
Arapahoe	12,729,700	35,610	12,765,310
Archuleta	2,245,845	149,558	2,395,403
Baca	2,190,577	277,530	2,468,107
Bent	7,095,035	174,015	7,269,150
Boulder	31,609,896	1,264,396	32,874,292
Chaffee	6,608,699	55,450	6,664,149
Cheyenne	2,506,289	2,828,230	5,334,519
Clear Creek	2,854,960	879,000	3,733,960
Conejos	5,260,901	3,904,700	9,165,601
Costilla	1,924,650	2,617,120	4,541,770
Custer	1,740,860	553,086	2,294,046
Delta	12,662,290	2,181,000	14,843,290
Denver	254,755,220	101,902,088	356,657,308
Douglas	5,519,965	52,565	5,572,530
Eagle	2,898,079	959,680	3,857,759
Elbert	5,524,038	1,444,752	6,968,790
El Paso	53,885,620	67,942	53,953,562
Fremont	12,729,902	3,182,475	15,912,377
Garfield	11,405,215	155,088	11,560,303
Hinsdale	643,885	2,438	646,323
Huerfano	7,886,436	963,570	8,850,006
Jackson	2,901,210	624,406	3,525,616
Gilpin	3,113,623	769,680	3,383,303
Grand	2,283,156	1,175,224	3,458,380
Gunnison	9,292,900	87,095	9,379,995
Las Animas	27,369,985	165,194	27,535,179
Lincoln	4,883,670	2,310,637	7,194,307
Logan	10,190,960	2,061,500	12,252,460
Mesa	22,914,850	127,361	23,042,211
Mineral	1,093,597	125,620	1,219,217
Montezuma	5,024,428	527,600	5,552,028
Montrose	10,823,975	123,033	10,947,008
Morgan	10,418,534	2,053,680	12,472,214
Otero	20,953,075	89,847	21,042,922
Ouray	5,107,376	28,008	5,135,384
Phillips	4,682,773	847,179	5,529,952
Pitkin	4,627,795	199,355	4,827,150
Pueblo	46,042,209	6,709,620	52,751,829
Rio Blanco	2.976,205	1,742,920	4,719,125
Rio Grande	4,118,840	4,841,160	8,960,000
Routt	9,787,545	44,968	9,832,513
San Juan	4,005,519	248,260	4,253,779
San Miguel	8,627,960	71,824	8,699,784
Sedgwick	4,145,170	53,109	4,198,279
Teller	14,075,740	38,085	14,113,555

122

County.	Valuation by assessor.	Increase by St. Bd. of Equalization.	Total as fixed by St. Bd. of Equalization.
Washington ...	7,218,673	256,257	7,474,930
Weld	37,180,260	23,447,440	60,627,700
Yuma	7,398,195	113,674	7,511,869
Saguache	4,024,491	4,248,085	8,272,576
Jefferson	15,226,445	13,003	15,239,448
Kiowa	2,288,930	1,722,645	4,011,575
Kit Carson.....	5,407,916	2,374,354	7,782,270
Lake	9,712,059	2,275,000	11,987,059
La Plata.....	11,014,253	80,494	11,094,747
Larimer	26,165,789	1,620,100	27,785,889
Prowers	12,730,300	146,971	12,877,271
Crowley	Unchanged.		
Dolores.....	"		
Moffat.....	"		
Park.....	"		
Summit	"		

The value of the property assessed by the county assessors for the year 1912 as shown by the auditor's report (see Biennial report State Auditor 1911-1912, page- 244-245) for these last named five counties was as follows:

Crowley	$1,989,684.00
Dolores	309,337.00
Moffat	1,247,935.00
Park	1,361,309.00
Summit	1,219,357.00
Total.....	$6,127,622.00

If a proper construction of the resolution is that the State Board made these increases for the purpose, as therein stated, of placing the property on the assessment roll at its full cash value as determined by the Board, then there is neither constitutional nor statutory authority for its so doing. The further contention that these increases were ordered as an incident to equalization is untenable, when the record and its effect are taken into consideration; but if attempted for this purpose it is in conflict with the announcements of this court in People ex rel. v. Lothrop, 3 Colo., 428, as well as the principles announced in

People v. Ames, 27 Colo., 126;
Gale v. Statler, 47 Colo., 72;
In Re Opinion of Justices, 123 Pac., 661, and
Chase v. Boulder County, 37 Colo., 268.

123 As I view it, to sustain the action of the Board for any reason set forth in the briefs would be to overrule the announcements in these former cases.

Subsequent to the Lothrop case this court in In Re Assessment of Property, etc., 25 Colo., 296, 299, said:

"The decision [referring to the Lothrop case] has also been acquiesced in by all of the departments of government and the people generally; and the general assembly has not seen fit to exercise the power, which is claimed to be inherent, of passing a law authorizing the State Board of equalization, in the discharge of its important duties, to increase the aggregate assessed valuation, as returned by the county assessors. In view of these considerations, and until the general assembly takes some action that requires it, we do not feel called upon, in this ex parte proceeding, to review our previous decision."

This announcement was at the April 1898 term of this court. Up to that time the legislature had made no effort to change the statutes in existence at the time of the announcement in the Lothrop case. Thereafter, at the special session in 1902 it enacted general sections 5764 and 5765 which read:

"5764. Meeting of state board of equalization to equalize assessment.—Sec. 237. The state board of equalization shall sit on the first Monday of October in each year, at the executive office, for the purpose of examining, adjusting and equalizing the assessments in the several counties of the state."

"5765. Board may change aggregate valuation. Sec. 238. The board shall have the power to either increase or decrease the aggregate valuation of all taxable property, not to exceed in any year ten per cent. of such aggregate valuation, and only as an incident to such equalization."

These sections continued in force until 1913 when section 5765 above referred to was specifically repealed. Page 527, Session Laws 1913. And no other provision was substituted which authorizes the State Board of Equalization to increase the aggregate valuation, but to the contrary the legislature, at its 1913 session divested the State Board of Equalization of all statutory power. Page 525, Session Laws 1913. That the legislature never attempted to give them this right by anything contained in the acts of 1911 and
124 1913 is apparent not only by the acts themselves, which divested them of all statutory power, but by the further fact that during its 1913 session the legislature submitted to the people to be voted upon at the 1914 election a proposed amendment to the constitution giving to the State Board of Equalization the power to raise the valuation of the property in the several counties. Laws 1913, p. 215. Hence, even if we were to assume as contended that the Lothrop case was based upon statutory grounds, the legislature has taken from the State Board all statutory right, without substituting anything in lieu thereof. This leaves the reasoning in the Lothrop case conclusive, regardless of which theory is accepted. That it has been acquiesced in and accepted as a rule of property in this state for about thirty-six years, is not disputed.

In State v. Equalization Board, 18 Mont., 473, the reasoning announced in the case of the People v. Lothrop, 3 Colo., 428, was

accepted as sound and followed with the declaration that the weight of authority is decidedly with its conclusion.

Wells, Fargo & Co. v. The Board of Equalization, 56 Calif., 194, and St. Joseph Lead Co. v. Simms, 108 Mo., 222, are therein cited as in principle sustaining the same conclusion.

For this court to now say that the State Board of Equalization is possessed with the power to increase the aggregate of all the counties in such an amount as they think ought to have been fixed by the county assessors, would be to amend the constitution by judicial construction and this at a time when we have pending a proposed constitutional amendment to be voted upon at the next election, which, if adopted, will give to the State Board the power which it is
125 sought to have this court say that they are already possessed of. Such a decision would place the legislature in the ridiculous position of having submitted a constitutional amendment which embodies therein important questions which this court, through some process of reasoning, would now say is already a part of the constitution. This would be to accomplish by judicial construction what the legislature has sought to accomplish by an amendment to the constitution. Suppose that such a decision is given and the people at the next election decide as they did at the last, when it was proposed to give the Tax Commission this power, that they do not care to grant even to the State Board of Equalization this extraordinary power, we would then be confronted with the ridiculous position of, by judicial construction, having declared a certain thing as being a part of the constitution which the people at the polls have declined to place in it and the only way to then get rid of it would be to submit another constitutional amendment which would declare that a certain thing should come out of it, which is not in it, and which the people have declined to put in it, and which this court (about thirty-six years ago) held was not in it, and which the legislature as well as all departments of the state have recognized as not being in it until the effort which brought about this litigation was started. The condition following such results would be humorous were it not so serious a question.

In Hacker v. Howe, 72 Neb., 385, relied upon as supporting the position of the relators it was said:

"Concerning the contention that the state board in respect of the action taken did not equalize but reassessed the property of the several counties, raising the aggregate valuations thereof according to the percentage applied to each county, it may be said that, manifestly, the board has no power to increase valuations merely for the purpose of making such increase. The limitations of law relative to tax levies, the fixing of valuations and the equalization thereof, cannot be nullified and rendered impotent by an attempt to increase the aggregate of the grand assessment rolls under the guise of equalization. * * * But, in the case at bar, we think it clear that the increase resulting from the action of the state board was purely incidental to a proper equalization of the assessment of the different counties as returned to that body. From the action taken it
126 is fairly inferable that, in 66 of the 90 counties of the state, property was found to be assessed uniformly and at its actual

cash value, while, in 24 counties, the valuations placed upon property generally were relatively too low and required, in order that the rule of uniformity might be observed and equality attained, a raise of the aggregate valuation of those increased from two per cent. in one instance to ten per cent. in others. Surely it may not be said that, it having been ascertained that so nearly all of the property of the different counties had been assessed at its true value, in order to properly adjust and equalize, there must be a reduction of a certain percentage in this larger number of counties and a corresponding increase and less than was ordered in the smaller number, so that the grand total of the assessment roll should not be disturbed. While a plan or method of raising the value of some of the counties and lowering others may be generally resorted to in order to bring about equality, yet it would, in the present instance, be in a measure a perversion of the law to reduce below its actual value by far the larger proportion of the property in the state subject to taxation for the purpose of avoiding an actual increase in the total valuation of all property. The statute does not limit the state board in the matter of equalization to the aggregate value as shown by the returns of all the different counties, Its provisions are that the board may increase or decrease by per centum to be added to or deducted from the aggregate value of the different counties to make them conform to law. Of course, they have authority to equalize; and to equalize is to adjust differences in values so as to bring all to a common standard, and to the end that all property assessed shall bear its just proportion of the burdens of taxation. Where equalization is the main object and the increase resulting therefrom is incidental, we think the action is undoubtedly a legitimate exercise of the powers conferred upon the board. If the object appears to be to raise the aggregate of the total assessed valuation, such action would, in our judgment, have to be condemned as an unwarranted exercise of the authority to equalize."

The court then comments upon its former opinion in Suydam v. Merrick County, 19 Nebr., 155, and also the opinion in Bardrick et al. v. Dillon, et al., 7 Okla., 535, pertaining to which it says:

"The rule as thus announced in the opinion cited is probably stated too broadly. The opinion apparently overlooks the fact that the valuation of property assessed for taxation is primarily for assessing officers, and that boards of equalization except as conferred by statutes are not authorized to change the result, and then only in order to effectuate an adjustment of values so as to bring about uniformity. Our statute, we think, contemplates that the state board of equalization may equalize valuations as between the different counties in the sense the word is usually and ordinarily understood. That is, the state board is empowered to correct and adjust inequalities in valuation to the end that all property shall relatively be valued on the same basis for purposes of taxation, as near as the same is practicable."

127 It will be observed from the above quotations that our Board has attempted to do what the supreme court of Nebraska holds cannot be done. The figures are self-evident that the

object is to raise the aggregate of the total assessed valuation. The resolution states that the object was to place all property upon a full cash value. The inclusion of this statement is the exclusion of the theory that it was attempted for the purpose of equalization, but regardless of the statement the figures are self-evident that it was not done or attempted as an incident to equalization.

I cannot agree that the case of Appeal of McNeal, 128 Pac. (Okla.), 285, entirely sustains the contention of the relators. In addition to its having been rendered by a divided court of three to two, an examination of the constitution and statutes of Oklahoma will disclose that their State Board of Equalization is authorized to increase or decrease the value of different classes of real and personal property in order to make their valuation conform to the fair cash value thereof. They also provide for an appeal by any taxpayer from such increase. This appeal is provided for in their 1910 Session Laws and is recognized in this opinion wherein, after quoting from an opinion in a former case, it is said:

"The limits expressed therein are the limits fixed by the Constitution. Every taxpayer is entitled to have his property assessed equally and uniformly with the property of every other taxpayer. If his property is taxed at its fair cash value estimated at the price it would bring at a fair voluntary sale, and the property of all other taxpayers is so assessed, then the uniformity sought by law has been attained; but if this property is assessed at less than this, and the balance of the property conforms thereto, then an injustice has been done the balance of the taxpayers and the state. This limit upon the assessment is the one provided for in the Constitution, and is also the limit of the levy which may be assessed. * * * Beyond the limit of fair cash value and the limit as to the rate of levy, the taxing authorities of the state cannot go; and wherever they seek to do so the law has provided every taxpayer a remedy by appeal, as provided in chapter 87, p. 173, Sess. Laws 1910."

It is also worthy of notice that in the Oklahoma case no point was made that the equalization by the State Board resulted
128 in raising the property in the county affected above its actual cash value. On this subject the opinion states: "It is worthy of note that no point is made that the equalization of which complaint is here made has resulted in raising the property above its fair cash value." The answer of the respondent alleges that the property of his county had been assessed at its full cash value and that this order, if followed, would place it forty per cent above that amount. According to our rules of pleading all material parts of this answer for the purposes of this case stand admitted as true. In such case were we to follow the Oklahoma decision we find that they have provided a method for appeal so that the question of the increase or reassessment might be determined by a court of competent jurisdiction where all parties can be heard, and their statute provides that pending such an appeal the party shall not be required to pay taxes upon the property in regard to the assessment of which the appeal is taken. Our statutes provide a method whereby the Tax Commission are authorized, if they find any particular property to

be assessed too low, to have a reappraisement upon notice to the owner, etc. Whether that portion of this act is constitutional or not is not before us. It is admitted it was not attempted to be followed.

Another reason why the action of the State Board should not be accepted as an effort at equalization between the different counties is because the order to raise pertains only to that portion of the property which has been assessed by the county assessors, but does not apply to the property assessed by the Tax Commission. The constitutional provision pertaining to the duties of the Board authorizes them to adjust and equalize the valuation of real and personal property among the several counties of the state. This court has heretofore held that they could not equalize by ordering an in-
129 crease in particular classes of property in a county. People v. Ames, 27 Colo., 126. Yet this is the result of this decision for it allows the Board to increase the value of all classes of property in a county except public utilities. 'Tis true, if they were included, take railroads for instance, accepting the legal presumption that the Tax Commission has performed its duty in assessing them, the result would be to fix their value at $140 for each $100 of actual value in the county of the respondent, $163 for each $100 of actual value in Weld county and $236 for each $100 of actual value in Costilla county and so on. The injustice of such a position is apparent, but this is the identical result which follows the present order concerning the moneys of all taxpayers (other than that owned by public utility corporations) in the counties referred to as well as certain mining properties and others. When the State Board formerly assessed the railroads they could fix their value in harmony with what they thought was the average for all the counties as returned by the county assessors, and when they made their equalization between the different counties, it was an effort at fixing valuations somewhere near equal upon all classes of property, but since the power to assess the railroads has been taken away from the State Board and vested in the Tax Commission with the additional authority given them to assess other public utility property, when we recognize the legal presumption that not only the Commission but that the county assessors who are constitutional officers have complied with the law, I fail to find any authority which grants to the State Board the right under the guise of equalizing between counties to simply order a raise as to certain classes of property in a county, namely, that of individuals without making it apply to all
130 property and to allow them to do this as disclosed by this record would be to reverse the opinion rendered in People v. Ames, supra, as well as to, by judicial construction, read something into the constitution which is not there.

It has been intimated that in making this increase to the total valuation of his county the respondent is not required to add the forty per cent to all the property assessed by him, but can place it where he thinks it belongs the same as when making an original assessment. That a person's property cannot be reassessed or re-

valued for the purposes of taxation without notice to him, I take it will not be questioned.

Gale v. Statler, 47 Colo., 72;
Turpin v. Lemon, 187 U. S., 51;
1 Cooley on Taxation (3rd Ed.), 626;
Hager v. Reclamation District, 111 U. S., 701;
Davidson v. New Orleans, 96 U. S., 97;
Bellingham Co. v. New Whatcom, 172 U. S., 314.

That we have no statute providing for any subsequent notice or hearing cannot be disputed, but to the contrary not only do these orders instruct the assessor to add this forty per cent to all the property assessed by him, but section 33, page 623, Session Laws 1911 provides that when an increase is ordered as an incident to equalization it shall be made in this identical manner. In addition the respondent has alleged (which stands undisputed) that this is the only thing he can do and as stated there is no statutory method provided for his doing otherwise; there is no provision made for notice or hearing before him or the county board of equalization by the taxpayers as to the effect of the result for the reason that prior to the receipt of these orders the time for all such has long since past.

131 In Hacker v. Howe, 72 Neb., 385, it is assumed that this is the correct method to follow where the increase has been ordered as an incident to equalization. The majority opinion, as I read it, holds that this is the only method to be followed; this precludes any assumption that it is to be done otherwise.

Had the legislature intended to give to the Tax Commission the power to reassess the property in a county other than public utilities, I think they would have thus stated. I fail to find anything in the acts of 1911 or 1913 which is susceptible of such a construction. The fact that section 13 of chapter 216, Laws of 1911 gives to the Tax Commission supervisory power over the administration and enforcement of laws pertaining to the assessment, levying and collection of taxes, certainly cannot be construed to mean that it gives them the right to usurp the functions of a county assessor in the assessment of property and in my opinion it has no bearing upon that question. Just as well contend that because the governor is the chief executive officer of the state and by the constitution is charged with the duty of seeing that the laws are faithfully executed, that he would have the right to reassess the property in a county or to reperform the duty of any county officer when he is of opinion that such officer is not complying with the law. That this section has no application is further borne out by the fact that it gives to the Commission the right to require the county assessor to assess at the full cash value under penalty of forfeiture and removal from office. This is one method provided to reach this result.

Subdivision 6 of this section provides that whenever, in the judgment of the Tax Commission, property in any county or municipal

subdivision thereof has not been assessed at its true and full
132 cash value, the Commission may make a reappraisement to the end that all classes of property in such district shall be assessed in compliance with law, and when ordered it shall appoint an appraiser and assistant appraisers, if necessary, who shall proceed to appraise the property in such taxing district and who shall have all the powers and perform all duties pertaining to the appraisement of property. The seventh subdivision provides that the Commission may raise or lower the assessed value of any real or personal property thus reappraised, first giving notice to the owner and fixing a time and place for hearing any person or persons interested, and that said hearing shall be held within the county in which said property is situate. By these two subdivisions another method is provided to reach the question of full cash value. That the inclusion of one or more methods is the exclusion of others unless there is positive language to the contrary, has been recognized from time immemorial as an elementary rule of statutory construction, as said in Pomeroy's Municipal Law, (2nd Ed.), p. 542:

"The express mention of one thing implies an exclusion of another. This is one of the fundamental rules of interpretation, and is applied especially to statutes, so as to prevent the extension of their commands or prohibitions to other things of the same class, when an enumeration of the subjects within their provisions is expressly made."

To the same effect in principle are:

In Re The Constitutional Convention, 14 R. I., 649;
State v. Hastings, 10 Wis., 525;
Cooley's Constitutional Limitations, p. 99;
Western Union v. Railroad Commission, 45 So., 598;
Page v. Allen, 58 Pa. St., 338;
Denver v. Hyatt, 28 Colo., 145;
Territory v. Ortiz, 1 N. M., 12;
Westbrook v. Wicks, 36 Iowa, 383;
Morris v. Wrightson, 56 N. J. L., 201;
State v. Henry, 87 Miss., 125;
1 Kent's Com. (5th Ed.), 467.

The majority opinion concedes that the Commission did not act or pretend to act under the provisions of subdivisions 6 and 7, supra;
that the other portions of this section containing their super-
133 visory power, rights and duties are not susceptible to a construction which gives them this power is apparent.

In State v. Drexel, 75 Neb. 751, the court had under consideration an act which provides that the State Board shall have general direction and control of the county assessors in the performance of their duties and shall direct the same, also that the county assessors should obey all rules and regulations made under the act and the instructions sent out by the State Board. It was held that these provisions did not give the Board the power to control the judgment of the assessors concerning the values of properties, for the reason among others, that if the rule were otherwise and the Board by this method

could direct the county assessors as to what values they should put upon property, it would thereby accomplish indirectly what it could not do directly, namely, that of reassessing, which they were not authorized to do.

I agree with the majority that the manifest purpose of chapter 216, Laws 1911, creating the Tax Commission was to place in a central body authority to aid in bringing about and maintaining a standard of values for the purposes of taxation, but it is elementary that in so doing they must proceed in the manner provided by statute; I cannot agree that a method was prescribed in section 31 giving them the right to reassess the property of a county upon the lump sum basis by adding a per cent to the value fixed by the assessor or at all. Neither can I agree that the method provided by subdivisions six and seven of section 13 (if constitutional) attempts to take from the county board any statutory rights pertaining to equalization. As I read these subdivisions they substitute a reappraisement by commissioners appointed by the Tax Commission in lieu of the work of the county assessor, leaving the equalization to be made by the county board as theretofore. By other portions of the act, as
134 an aid to carry out their supervisory power in seeing that the tax laws are enforced they are given the right to prepare forms, to issue orders to the different taxing officers as will best carry into effect the provisions of law concerning taxation. It is provided that such officers, generally speaking, shall follow their instructions and shall be subject to penalty for violating them, they are given authority to prescribe a uniform system of procedure, to fix the form for tax schedules, rolls, warrants, notices and forms furnished to taxpayers, to call for reports from state, county and local officers, and to investigate the work of assessors, boards of county commissioners, equalization and county treasurers concerning the question of taxation, etc. For these purposes it is provided that one or more of their members shall visit at least half the counties of the state annually and each county at least once in two years; they are authorized to summons assessors to appear before them to be examined under oath, to annually hold a meeting of the county assessors; to call groups of two or more together to appear in courts concerning questions of taxation; to pass upon the remission of taxes; to hear certain classes of complaints when made concerning taxation matters; to inspect books and make investigations; to require the production of documents and many other duties, but none of which includes the reassessment of property save and except subdivisions six and seven of section 13 under which it is admitted they did not proceed, the act having thus prescribed their powers and duties in detail which do not contain any provision for reassessment except as provided in subdivisions six and seven the rule of construction which I have heretofore referred to is unquestionably applicable.

The fact that the Tax Commission were given the powers and duties referred to, which, if performed will of necessity cause the gathering of general information pertaining to taxation matters and the relative values of the different counties, is convincing
135 to my mind when considered in connection with the language used that their duties as prescribed in sections 31 and 32 of

the act of 1911 were for the express and only purpose of advising the State Board of Equalization of what in their opinion were the relative values of the different counties, and how much each was above or below its full cash value, and to relieve that Board, which is composed of the executive officers of the state, of at least a portion of such detail work in gathering data, etc., in order to ascertain the relative values for the purpose of performing their constitutional duty of equalizing.

The mere statement that a statute means so and so proves nothing, persuasive reasoning is best presented by a consideration of the language used. Section 31 reads:

"Section 31. Duty of the Commission. The Commission shall, on or before the first day of October following, determine whether the real and personal property of the several Counties in the State shall have been assessed at its true and full cash value, and if, in the opinion of the said Commission the real or personal property within any County in the State as reported by said County Assessor to the said Commission is not on the assessment roll at its true and full cash value, the said Commission shall determine the increase or decrease in the valuation in such County by such rate per cent, or such amount as will place said property on the assessment roll at its true and full cash value."

Do we find in this section any language which says or can be construed to mean that the Commission shall reassess the property, and if so when such an effort shall be attempted, or any date or dates when they shall sit for that purpose, or when they shall hear any county citizens, collectively or otherwise, concerning such questions? Is there anything to be found which says that the Commission shall directly, indirectly or otherwise change, alter or amend, or order to be changed, altered or amended the abstract of assessment transmitted to them by the county assessor? I think not. It pro-
136 vides that they shall make a finding as to the relative values of the different counties, the benefit of such must be for the board which has power to equalize but the Commission is not possessed with that power. As I view it the reason why it makes no provisions for hearings, fixes no dates for anything other than when it shall finish this work and makes no provisions for orders to the assessor or for changes in his schedule, etc., is because it was never intended that their findings should bind any one or be other than a recommendation in the way of a report to the State Board of Equalization. This position is borne out by what follows and what becomes of this finding. Section 32 following reads:

"Section 32. Statement to the State Board of Equalization. When the Commission has determined the true value of the real and personal property in the several Counties, the Commission shall transmit to the State Board of Equalization a statement of the amount to be added to or deducted from the valuation of the real and personal property of each County, specifying the amount to be added to or to be deducted from the valuation of the real or personal property."

The substance of this section is that they shall send to the State

Board of Equalization a statement concerning the result of their findings, what then happens? Section 33 following reads:

"Section 33. Duty of State Board of Equalization. It shall be the duty of the State Board of Equalization to examine the abstracts of assessment as submitted by the State Tax Commission and the State Board of Equalization shall forthwith examine the abstract of assessment of each County as submitted by the State Tax Commission and make a record of its action on the abstract of each County and certify the same to the County Assessor, and the County Assessor shall forthwith add to or deduct from each tract or lot, and its improvements, of real property and all personal property in his County the required per cent, or amount on the valuation thereof as it stands after it has been equalized by the State Board of Equalization, adding or deducting in each case any sum less than five dollars so that the value of any separate tract or lot and its improvements shall be ten dollars or some multiple thereof."

Do we find anything in this section which says or can be construed to mean (if it could be authorized) that the State Board should accept the findings of the Tax Commission or that they should make this increase to the abstract of the county assessor or order the assessor or the Tax Commission to do so? Not at all. But to the
137 contrary, it says that they shall forthwith examine the abstracts of assessment of each county as submitted by the Tax Commission and make a record of its action on the abstract of each county and certify the same to the county assessor, etc. It will thus be observed that the only object in having the Commission gather this data and make these findings is for the information of the State Board of Equalization in the performance of its constitutional duty.

The fact that all its statutory duties have been taken away and transferred to the Tax Commission can in no wise change the result, and does not change the language in these sections, neither can it strip the State Board of any of the powers and duties imposed upon it by the constitution. It will be observed that section 33 does not say what the State Board shall do with these abstracts other than examine them, make a record of its action and certify the same to the assessors. The reason is apparent and that is that their action thereon is the constitutional duty to adjust and equalize: it is for that purpose they are sent to them; that they are to be thus sent is not changed by the act which takes from them their statutory duties and vests it in the Tax Commission. The most that can be contended for section 33 in this respect would be that the Tax Commission should certify to the different county assessors the result of the action of the State Board of Equalization and this is just what the Commission did.

Whether the construction given to section 31 of the act of 1911 by the majority would make it unconstitutional, in my opinion, is unnecessary to consider, as I cannot conceive that it is susceptible to such a construction. The reasoning presented to support it is about as convincing to me as the assertion would be that the word
138 "no" means "yes". By the holding of the majority as I understand it a county can be revalued and reassessed for

all taxation purposes by the method prescribed in subdivision 6, supra, or under section 31 eliminating the constitutional question of notice and opportunity to be heard under the latter section the conclusion must follow that the county assessor although a constitutional officer could by the same process of reasoning be supplanted in all matters pertaining to local assessments, if not where is the line to be drawn? It appears to me that this position is in conflict with former declarations of this court. In Taxation of Mining Claims, 9 Colo., at page 636, it is said:

"Before taxes can be levied upon any article of property, it must be assessed, that is to say, valued for taxation. This, in general, is the province of officers whose title of office indicates their duties, to-wit, assessors. The constitution has created this office, and requires that an assessor shall be elected biennially in every county of the state."

While in a later case, that of Ames v. The People, 26 Colo., 83, it was said that this language was not necessary to the decision; it was not stated that it was unsound when applied to local property situate in the county, such as mining claims which were the subject for assessment under consideration in the former case.

The latest case by this court upon this subject is In Re Opinion of Justices, 123 Pac. (Colo.), 660, wherein we sustained the constitutionality of that portion of the act creating the Tax Commission, but we expressly called attention to the fact that we could not approve a construction of any portion which would contravene the constitutional authority of county assessors. That portion of the opinion reads:

"If provisions of the act can properly be construed as permitting the Tax Commission to do things in the matter of local assessments which would contravene the constitutional authority of county assessors, such provisions are necessarily non effective." As it
139 looks to me this is the result of the conclusion of the majority and is in effect an overruling of this declaration for if by this method the property in a county can be locally reassessed and revalued for the purposes of taxation for city and county purposes, as well as state, as here held, then the office of county assessor becomes one in name only, and it would be a useless expenditure of public moneys for any assessor to go through the form as it will be only a form of assessing property and it will be a useless expenditure of time and money for county commissioners to sit as a board of equalization for all their efforts will avail nothing, if without investigation and without the adoption of any method the valuation of property can be admittedly fixed at grossly inadequate sums or at a sum largely in excess of its true cash value.

I cannot agree with the correctness of the statement 'that it is not conceded that the property assessed as valued by the county assessor is at its full cash value.'

In his answer the respondent alleges certain facts, the substance of which are that the property in his county assessed by him was assessed at its full cash value; that the Tax Commission in making

its estimate did not make an investigation and did not visit the several counties of the state as by law they are required to do and did not pursue a uniform method or test for the purpose of ascertaining whether in truth and in fact the value of real and personal property had been assessed at its full cash value, but that they arbitrarily and without ascertaining the truth as to whether the respondent assessed the property in his county at its true cash value, proceeded to determine that he had not made a full and true cash value thereof and that they, in an arbitrary way and without warrant, in fact,
140 declared and determined that they would increase the valuation of said real and personal property in his county to the extent of $101,902,088, making the rate of increase forty per cent in excess of its full and true cash value. He further alleges that their action in this respect was fraudulent insofar as it affects the owners of real and personal property in his county. The relators have demurred to this answer, for which reason all material parts for the purposes of the case stand admitted as true, and I cannot concede that the performance of the duties of the Tax Commission in the manner provided by statute is immaterial, or that the allegations concerning the real value of the property in the county of the respondent is to be ignored, when by the opinion as I understand it, the taxpayer is to be precluded hereafter from raising it anywhere.

Neither can I agree to the statement by the majority that "It is conclusively presumed, however, that as between individual property owners within the county there has been a just value placed thereon, that is a value relatively equal." Unless it is likewise to be conclusively presumed that all property in the county has been assessed at its full cash value, as I view it under the law the one presumption is entitled to as much weight as the other; there are many reasons why it should be so. Take for instance the value to be placed upon producing mines, the assessor has no discretion in fixing their value. The act of 1913 provides that for the purposes of taxation the assessor shall value them at a sum equal to one-half of the gross proceeds plus all of the net proceeds, and it provides a method whereby these proceeds are to be accurately ascertained. The provisions of this act are mandatory and the assessor has no right to do other than follow its mandates. The county board of equali-
141 zation as held by the majority, would likewise have no authority to change the valuations thus fixed in the manner provided by statute; other illustrations could be given. The presumption must of necessity follow that all other property in the county has been likewise assessed or equalized to this value; so that when it comes to legal presumptions the one is equally entitled to as much weight as the other.

The majority misconstrue respondent's position pertaining to the reason of the legislature in submitting the proposed amendment to section 15 of article X of the constitution which the people rejected at the 1912 election. It is not claimed that it was done because the legislature was of the opinion that the act passed by them was unconstitutional and that they thereby sought to correct it by submitting a constitutional amendment, but to the contrary, it was submitted at the same session (1911) when the act creating the Tax Commission

was adopted and was thereby a legislative construction, not that they thought any portion of the act was unconstitutional, but because they construed their own act to mean, they had not given to the Tax Commission any authority to assess, value, reassess or revalue counties as a whole by per cent or otherwise, except as provided in subdivisions six and seven section 13 supra, had they intended giving to the Tax Commission this power in the act creating it which we agree they must assume was constitutional, why would they have inserted the identical powers in a constitutional amendment submitted at the same session? I do not care to charge the legislature with the doing of useless and unnecessary things, to my mind the submission of the constitutional amendment is a legislative declaration that they did not construe their own act to include this power, but regardless of this legislative construction and in disregard of the fact that
142 the people have declined to grant to this Commission this power even by constitutional amendment a majority of this court now say that nevertheless they have the right to exercise it.

Another reason why the legislature never intended that the Tax Commission should have the right to raise the total by counties as ascertained by the county assessors is its enactment at its last session of the so-called limitation levy act wherein it is sought by limiting the amount of the levy in each county to compel the assessor, in order to get sufficient revenue for county purposes, to assess all property therein at its actual cash value. If it was intended as contended that the Commission has the right to increase the aggregate, then it is pertinent to ask why the necessity of any limitation of the levy for county purposes. Why not allow the Commission to fix the value of each county, regardless of the value fixed by the taxpayers and the county assessors? The question to my mind answers itself and is self-evident that the legislature never intended by any act of theirs to grant this power.

The theory that a Tax Commission can reassess or revalue a county as a whole upon a per cent basis or in a lump sum for the purposes of taxation for all local taxes as here held, as before stated is not claimed in the briefs, and no authorities have been cited which refer to such a statute. The cases cited pertain to equalization boards, or to reassessments of particular properties where notice is given, etc.

In State ex rel. Hessey v. Daniels, 143 Wis., 649, the opinion in addition to being rendered by a divided court has no application. The result of that decision was to sustain the validity of chapter 259, Wisconsin Laws 1905, which provides that upon complaint made after notice, hearing, etc., it is made to appear, etc., that the assessment in any district is not in compliance with law,
143 etc. The Commission may order a reassessment and a new equalization and for that purpose shall name persons to make the reassessment and others the equalization. The act provides that the parties thus named shall take the oath, etc., give all the notices and go through all the formalities required by the assessor and Board of Equalization whose work they are to do over. It provides that any owner of taxable property in such district shall

have the right to examine such reassessment and shall have all the rights and privileges in respect to such reassessment that are given by law in respect to any original assessment. It will thus be observed that the right to be heard before all tribunals passing upon the value of his property is, by the Wisconsin statute, given to the taxpayer the same as in the first instance. This would have been the result here had the Commission acted under the sixth subdivision of section 13, supra, but it is admitted that they did not attempt to do so, but to the contrary the pleadings disclose that they in fact made a reassessment without investigation and without any effort at ascertaining the value of the property to be thus assessed, leaving it to pure guesswork.

The case of Wisconsin ex rel. Brown County v. Myers, Judge, 52 Wis., 628, was upon the same theory as the later case in the 143rd Wisconsin, the difference being that the contention in the earlier case was limited to the appointment of commissioners to review the aggregate equalization made by the county board in order, as the opinion states, to produce a just relation between all the valuations of the taxable property of the county. By the earlier statute this commission was appointed by the circuit judge. The reasoning is similar to that in the latter case concerning the question of review, and, while not having the time to investigate the earlier statute, it is fair to assume that the constitutional
144 rights of the taxpayers concerning notice, hearing, etc., were fully protected. The opinion further discloses that the appointed board was without authority to increase the entire aggregate valuation of the taxable property of the county as previously fixed so that when it comes to equalization its conclusions are in harmony with the announcement of this court thirty-six years ago; it has no application to the facts here.

The case of Board of State Tax Commissioners v. Board of Assessors, 124 Mich., 491, sustains the validity of the Michigan act of 1899 creating a Board of State Tax Commissioners and giving them supervisory authority in the matter of the assessment of property. It has no application to the views of the majority, but to the contrary it is in harmony with our views in In Re Opinion of Justices, 123 Pac. (Colo.), 669, which opinion, as I take it, is in part overruled by the conclusion reached by the majority.

The case of Spalding v. Hill, 7 S. W. (Ky.), 27, sustains the validity of the Kentucky act creating the State Board of Equilization with the right to equalize as between counties and nothing more. I am unable to appreciate its application to the facts here. The substance of the opinion in Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, Treasurer, 133 Ind., 513, is to sustain the validity of an act authorizing the State Board of Tax Commissioners to assess railroad property. This is in harmony with the views of this court.

In State v. Thomas, 16 Utah, 86, the opinion discloses that the constitution and statutes of Utah are different from ours. Under theirs the State Board of Equalization has the right to change the value of certain classes of property allowing others classes to remain

unchanged. In that case the attempted effort to raise all
145 classes was declared invalid. The question of lack of notice to the individual taxpayers as a denial of the equal protection of the law or as taking property without due process of law was not gone into. I gather this from the concluding statement in the opinion which reads: "The order cannot be upheld as a proper exercise of authority, and is therefore void. Having reached this conclusion, it is unnecessary to discuss any other question presented in this case." While it is true under their constitution and statute it was held that as an incident to equalization the State Board had power, if necessary, either to raise or lower the total valuation of the property of any county fixed by the county assessor, even though it might by such action raise or lower the aggregate valuation of all counties of the state. It was expressly held that it was beyond the power of the board to raise the value of money in any county for the reason, as stated in the opinion, which, when referring to this order calling for the general raise of all property in the county, says:

"It was also defective because it included money in its operation. It clearly cannot be held operative as to money, for, as appears from the record, each dollar of the relators, on the assessment roll, is valued at a dollar; and, when money is so valued, no board or officer can add 5 per centum or any per centum to it. This is so under the constitution, which makes money the standard of valuation for all taxable property. The value of all property, however, cannot be determined in the same way. Because of its dissimilarity, the process by which the judgment is formed must vary, and probably as to all property, except money, perfect equality in valuations and assessments is unattainable, owing to the fallibility of the human judgment. The value of a dollar may be determined by ascertaining that it is what it purports to be. Porter v. Railroad Co., 76 Ill. 594.

The legal value of a dollar in money is a dollar, and therefore to value and assess it at more than a dollar cannot be a valuation and assessment, 'according to its value in money.' This being so the court will take notice, as matter of law, that money cannot be assessed for more than its legal value. Hence, from the nature of things, the state board cannot change the valuation of money on the assessment roll already assessed at its legal value and thereby make it cease to conform to the mandate of the constitution."

146 By the use of this language it is evident that the Utah court means that their State Board cannot order all property in a county to be raised to a certain per cent when such an order would mean to raise some above its true cash value.

Applying the declarations in the Utah case to the facts here, coupled with the legal presumption which must prevail that the method provided for fixing the value of mines, money, etc., was adhered to, what is the result when tested by section 3 of article XX of our constitution pertaining to the uniformity of taxation? To do this it should be borne in mind that by authority of Chapter

133, Session Laws 1913, the Tax Commission assessed and fixes the value upon the property of all public utility corporations in any county. They are not assessed by the county assessors and this increase of forty per cent applies only to the property assessed by respondent and not to the public utility property, which we will assume has been assessed at its fair cash value.

To illustrate, take the person who has $100 in money and who makes a sworn statement of that amount and of the value of $100; money has only one value and is the standard of values. The respondent assessor, as provided by law, has under his oath assessed it at the value of $100, but by this order he is compelled to raise its value to $140, and this without opportunity to the owner to be heard before the body which has ultimately fixed the value of his $100 at $140, if in Weld county for his $100 the owner would pay taxes on $163, if in Costilla county on $236, and in fact a different value would by this method be fixed for $100 in money in nearly every county in the state. While on the other hand the pub-
147 lic utility corporation returns its sworn statement of moneys to the Tax Commission which fixes the value of its $100 at $100 and has it thus assessed properly so. The corporation has had the additional advantage of being heard before the body which makes the assessment. We thus have the corporation's $100 assessed at the value of $100 by the State Tax Commission with full right to be heard before that body, while the value of the private citizen's $100 is fixed at a value of $140 if in Denver, $163 if in Weld, or at $236 if in Costilla county, and so on without any right before, at or after it is thus fixed to be heard before the tribunal which has thus fixed its value.

Unless we are to ignore our rules of pleading and the legal presumption to which every officer is entitled, that he has performed his duty, and assume that about all of our assessors are open violators of the law, and that the great mass of people in Denver who have subscribed to their returns are criminals, this raise means that the individual taxpayers' property in Denver will be valued for taxation purposes at forty per cent higher than that of the public utility. To better illustrate, it means that every little home in this city of the value of $1,000 and which has been assessed at that amount by the assessor and which by the pleadings is conceded to be only of that value, must pay taxes upon an arbitrary valuation as fixed by this order at $1,400. A citizen with property of the value of $100,000 must pay upon a valuation of $140,000 and so on. When applied to the statute which provides the method for ascertaining the value of producing mines it means that the results ascertained thereunder are to be disregarded and the values as thus fixed by law are to be changed out of proportion to their actual cash value to the
148 same extent as the illustrations heretofore given concerning money will disclose. To better illustrate, say for the purposes of taxation that the value of a mine in Costilla county has been fixed at $10,000 by the statutory method concerning which the assessor has no discretion, yet by this order of the Tax Commission

it is raised to $23,600 with no possible method of relief pointed out by the majority to the owner.

The constitution of the United States provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Our constitution provides that no person shall be deprived of life, liberty or property without due process of law. In my opinion it is very questionable if the action of the State Board in this respect does not violate these provisions.

In Londoner, v. Denver, 210 U. S., 386, it was said:

"It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

While this opinion refers to a special assessment yet if I understand our present statutes correctly they attempt to provide a complete system for the assessment of property for taxation, including the fixing of its value by special tribunals provided for that purpose, namely, the county assessor, county board of equalization as to certain property the Tax Commission and the State Board of Equalization. Certain times and places have been provided
149 whereby certain taxpayers can present their grievances to certain of these tribunals concerning the valuation of their property; in certain instances appeals are provided to the court but in order to secure them certain steps must be taken at certain times and in case the taxpayer neglects to do so he is denied the right to object in the courts for the reason that the objections must in the first instance be considered by the special tribunals and their ruling except in case of appeals provided by statute are intended to be final. As I read it the majority opinion sustains these conclusions, but by holding that section 31 of the act of 1911 gives to the Tax Commission the right to reassess the property in the county theretofore assessed by the county assessor, it leaves the taxpayer, whose property is thus reassessed and raised, without any right to be heard before the tribunal which the majority holds has the right to make the increase. Neither is there any provision for subsequent hearing before the county assessor or county board pertaining to such increase; the times provided by statute for hearings before them or their right to act has gone by. That such a hearing may

be given before any of these bodies as a matter of favor instead of being provided by statute as a matter of right, is not sufficient.—
Security Trust Co. v. Lexington, 203 U. S., 323;
Stuart v. Palmer, 74 N. Y., 183;
Weyerhaueser v. Minnesota, 176 U. S., 550;
Kentucky Tax Cases, 115 U. S., 344;
Cook v. Lasher, 73 Fed., 701;
Spencer v. Merchant, 125 U. S., 356.

I cannot agree that the principles applicable to the State Board of Equalization apply with like force to the Tax Commission when attempting to make a reassessment of property, assuming arguendo that section 31, supra, empowers the Commission to add to or deduct from the valuation of all the property in the various
150 counties there is nothing in the section which provides for hearing, notice, etc., or certain times fixed for so doing, no dates are fixed for anything other than when they shall finish their labors, other times are uncertain and indefinite. If an assessor makes his return before the first Monday in September which he is permitted to do, the Commission could commence to work on it at any time. I fail to find anything in any portion of this act which can be construed to mean as fixing any time or place for hearing upon this question by the individual taxpayer or by a county's representatives. The reason, in my opinion, is apparent, namely, that the information thus gathered and findings made are advisory only to the State Board and the holding otherwise, probably, presents a case of the taking of property without due process of law. I cannot agree that section 15 of the act has any application to matters to be acted upon by authority of section 31. Its language indicates to the contrary; it reads:

"Section 15. Complaints. The Commission may receive complaints and carefully examine into all cases where it is alleged that property subject to taxation has not been assessed or has been fraudulently or for any reason improperly or unfairly assessed, or the law in any manner evaded or violated, and may cause to be instituted such proceedings as will remedy improper or negligent administration of the taxation laws of the State."

It is self-evident that nothing in this section can be construed as pertaining to any hearing concerning any reassessment of the entire property of the county by the Tax Commission; but to the contrary it means as it says, that upon complaint which alleges that the property subject to taxation has not been assessed or has been fraudulently or for any reason improperly or unfairly assessed or the law evaded or violated; they may cause to be instituted such proceedings as will remedy, etc., some of which proceedings have hereto-
151 fore been pointed out. It is not claimed that in making their findings under section 31 the Commission acted upon the complaint of anyone. Subdivisions 6 and 7 of section 13 contain provisions for notice to the taxpayer and provide for a hearing when the value of his property is to be raised, hence, it is proper to assume that had the legislature intended that the value of his prop-

erty separately or in conjunction with the entire property in the county could be revalued and the value increased by the Commission under the provisions of section 31 that it would have provided some method for notice to him or the officials of his county or have fixed some particular time for so doing and for the hearing of complaints.

As I view it the taxpayer, the value of whose property has been raised by this reassessment or his county's representative, is not given an opportunity to be heard before the body which has made the raise, to-wit, the Tax Commission. Two other members of the court concur in this conclusion, four to the contrary. In case No. 8208. The State Board of Equalization v. The Bi-Metallic Investment Company, et al., which is a suit brought by a taxpayer to enjoin the respondent from extending this increase upon its property and which case was argued with this, the district judge was of the opinion that such a hearing had not been provided and that to allow the increase to be added would be the taking of property without due process of law, so that thus far the official expressions by the judiciary of this state upon this question stand equally divided. 'Tis true, the trial judge who rendered this decision is not a member of this court, but an examination of the Session laws will disclose that for a long time he has been upon the district
152 bench and was one of its judges as early as 1889 and while his conclusion has not the same effect as that of a member of this court, his long period of service and record is such as to entitle his opinion to great respect, and if this point could be disposed of by the reasoning in former opinions of this court, I am confident that they sustain the conclusion that such a hearing has not been provided in the method followed.

To go into the question of due process of law, etc., in detail would be to unnecessarily extend this opinion. The question was not involved in the Oklahoma case because their statute gives to the taxpayer this protection. The Utah court found it unnecessary to consider it upon account of their decision being against the State Board for other reasons. The Nebraska court, without going into the fact in detail, intimates that the taxpayer whose money has been assessed at more than its actual cash value might be entitled to a hearing and secure relief in a court of equity, when and for any reason that would not be in conflict with their ruling in sustaining the validity of the action of their State Board is not disclosed, but these cases and others cited are all on the question of equalization. No cases on reassessment are cited wherein such a notice and hearing has not been provided. If I read history correctly, one of the main grievances of our forefathers was the fact that there was imposed upon them the burden of taxation without representation; personally I am unable to appreciate any difference between taxation without representation and taxation without the right to be heard concerning the value of the property upon which the tax is to be imposed. In my opinion the inequity following the results is about as near equal in the one case as in the other. Upon this ques-

tion of due process of law concerning taxation matters I call
153 attention to the following cases:

Central Ry. Co. v. Wright, 207 U. S., 127;
Security Trust Co. v. Lexington, 203 U. S., 323.
Hovey v. Elliott, 167 U. S., 409;
Windsor v. McVeigh, 93 U. S., 274;
Gale v. Statler, 47 Colo., 72.

When the difference between the rights, duties and privileges of the corporation which owns the public utility and other taxpayers is considered, it is questionable whether the method which the majority approves is not a denial to the individual taxpayer of the equal protection of the law. It will be observed that he is given a hearing before the assessor or the county board of equalization concerning the value of his property and as compared with that of certain other property assessed by the county assessor, but this does not apply to the public utility because his county board has no jurisdiction over that, he is not given any hearing before the Tax Commission concerning the valuation of his property as compared with the public utility, or as to the revaluing of it for any purpose, while the corporation is given hearings before them concerning both these questions; besides, a hearing before this body under section 31 would do him no good for as construed by the majority the section does not permit of their doing otherwise than reassessing the property in his county upon the per cent basis as a whole. After the raise is ordered he is not entitled to any hearing before his county assessor or county board for the time for all hearings before them has gone by, and if they granted it they could afford him no relief. This, in substance, as I construe the opinion, means that the corporation can be heard before the body which makes its assessment, with the right to present evidence, data, etc., concerning the valuation of its public utility and a comparison as to the relative value between it and
154 other property, and that the Commission, without investigation, can make a guess at or arbitrarily fix the valuation of the individual taxpayer's property by reassessing a county in lump under section 31 and without the right of a hearing upon his part or even by his county's representatives. In my opinion this presents a rather one-sided star-chamber system of procedure in favor of the corporation upon the question of taxation. As it looks to me it includes the trial and in this instance the conviction of the little fellow without his having an opportunity or right to be heard or even to be present during the trial of his case or at any time afterwards. Upon this question I call attention to County of San Mateo v. R. R. Co., 13 Fed., 722, cited by this court with approval in U. P. Ry. Co. v. De Busk, 12 Colo., 302.

Unquestionably some property in Denver, as well as other counties has been assessed too low, as has likewise unquestionably some public utility property, but these are no reasons why former decisions should be overruled or constitutional provisions ignored and this at a time when a proposed amendment has been submitted to be voted upon at the next election, for the purpose of amending the constitu-

tion upon this subject. Were the question one which involved the State Tax alone it would not be so serious in its results, but when we consider that the question of equalization between the corporate property defined as public utility and the property of individuals applies as well to all county, city, school and other taxes, the gravity of the situation is apparent. In the Bi-Metallic Investment Company case, supra, brought in the district court for the purpose of preventing the respondent from adding this increase, it was alleged that its property was not of the value of $802,000 which amount had been fixed by the respondent assessor; that the forty per cent increase ordered of $320,800 would make the total not less
155 than $500,000 in excess of its real and full cash value.

Public records disclose that the tax levies in Denver for 1913 were made upon November 24th and for state, county, city and ordinary school purposes (all of which apply equally throughout the city and county), were fixed at fifteen mills, when the company is held to have accepted the value fixed by the county assessor. This levy upon the increased value which it offered to prove its property was not worth, will amount to $4,812 and if my conclusion as to what the majority opinion means is correct, the company has no recourse elsewhere and if the allegation of its complaint is true, which it offered to prove, it appears to me that this is a taking of this much of its property without due process of law. When we accept the legal presumption that this respondent and his county board have performed their duty in assessing the property at its full cash value (which fact they have offered to prove) considered with the pleadings by which this fact stands admitted as to all other property in his county assessed by the respondent, the result means that the individual taxpayers therein are to pay $1,528,531.32 in excess of their proportion of taxes for all purposes in the city and county of Denver for 1913, upon account of this inequality between the relative values of their properties and that of the public utility. The fact that upon account of this increase they may or can reduce the amount of their local levies as has been intimated (a question concerning which I express no opinion) will not change conditions concerning the comparison of values referred to, as any reduction in the levies will apply equally upon all values in the county as fixed by this method which includes this increase upon the property of the private citizen but adds nothing to the public utility property of the corporation.

156 No. 8200.

Mr. Justice GABBERT, dissenting:—

The state board of equalization raised the assessed valuations of property in the state about $187,000,000.00 above that returned by the assessors, the raise in the City and County of Denver alone being nearly $102,000,000.00. This action is upheld by the majority opinion on the ground that the commission raised the valuation of the property in the counties affected by increasing the value in each of these counties to its cash value; that this was an assessment of such

property and that the board in equalizing assessed valuations among the counties of the state treated this action of the commission as a reassessment and therefore did not increase the assessed valuations.

The act creating the state tax commission, (See Session Laws 1911, Chapter 216), does not confer power on the commission to assess the property in any county in a lump sum by a horizontal raise above the valuations returned by the assessors. Section 13 specifies in what circumstances the commission may reassess or reappraise the property in any county. Whether the authority thus conferred can be legally exercised is not involved, for the reason that the action of the commission which the majority opinion says was a reassessment was not based upon these provisions. The commission and board claim to have raised the valuations above that returned by the assessors by virtue of the provisions of Sections 31, 32 and 33 of the act. There is not a word in either of these sections which directly or indirectly authorizes the commission to reassess the property in any county by determining its true cash value or requires the board to
157 treat any such action of the commission as a reassessment.

The act, as stated in Section 13, does purport to authorize the commission to reasses or reappraise property in any county, in specified instances, and, clearly, had it been the intent to confer upon the commission, under Sections 31 and 32, power to reassess property by a horizontal raise, or any additional power to assess, and that the board, by Section 33, was to treat such raise as an assessment, it would have been so stated.

Neither did the board regard the action of the commission as an assessment. From its resolution, which is the basis of this action, it appears, not that it equalized valuations returned by the assessors, or the commission, or both, but,—

"Has determined the amount of the valuation of the real and personal property of each county as will place said property on the assessment roll at its true and full cash value;"

thus showing that its action was, in no sense, an equalization of valuations but that it fixed the valuations in each of the counties affected in such sum as would place the property therein on the assessment roll at its cash value.

The vital question, therefore, is whether the board in the exercise of its functions as a board of equalization was the authority to increase the aggregate valuations returned by the assessors. This must be determined by ascertaining;—first,—its authority under the constitution; and, second,—whether the statutory provisions to which reference was made conferred such authority as will support its action.

The power of the board as a board of equalization under the constitution was determined in the Lothrop case, more than 36 years ago. It was there held that to concede it the power to increase
158 the valuations returned by the local officials made it practically a board of assessors with authority to fix and determine values as well as to adjust valuations; that the constitution provides for the election of an assesser in each of the counties of the state and that the intention of the people by this provision was to preserve

local control over the valuation of property for the purpose of taxation; that the power to fix and determine the valuations of real and personal property for this purpose was lodged in the assessors and board of county commissioners of the several counties of the state; and that when these officials had performed this duty the sum of the valuations of the several counties as returned by them must be taken as the aggregate valuation of all the property in the state and was final and conclusive upon the board and that it might, for the purpose of adjusting and equalizing, increase the valuation of one county and decrease the valuation of another but was without authority to increase the sum of all the valuations of the several counties of the state. In brief, it was held that the power of the board as a board of equalization was limited to reducing to a uniform basis the valuations made by the local officials so that the burden of taxation for state purposes would be apportioned equitably among the several counties of the state. The constitutional provision involved is no different now from what it was when the Lothrop case was decided.

The next question is whether the statutory provisions to which reference has been made authorize the board to increase the aggregate valuations returned by the assessors. These provisions purport to empower the commission to determine whether the total valuation of the property in any county as returned by the assessor is the true value thereof and, if not, determine the increase *of* decrease
159 which shall be made by such rate per cent as will place the property therein on the assessment roll at its cash value and report this action to the board; that the board shall examine the abstracts of assessment as submitted by the commission, make a report of its action thereon, certify the same to the county assessor, who shall add to or deduct from the property in his county the per cent and amount on the valuation thereof,—

"As it stands after it has been equalized by the state board of equalization."

There is not a word in either of these sections which authorizes the board to increase the aggregate valuations returned by the assessors. On the contrary, the section which directs what the board shall do requires it to direct what per cent of increase or decrease shall be made on the valuation after it has been equalized. As pointed out, the commission is not authorized to make an assessment by a horizontal raise or reduction; so that the only values which the board can equalize must be those returned by the assessors.

If, however, it was the intention to confer upon the board authority to increase the aggregate valuations returned by the assessors its action is a nullity. In the Lothrop case it was claimed that by statute the board was authorized to make such increase. Speaking to that point the court said,—

"Let us then inquire where, under our constitution and laws, this important power of determining the valuation of taxable property as a basis of taxation is lodged. The constitution provides (Section 8, Article 14) for the election in each county each alternate year of a county assessor. He is thus a constitutional officer and though his duties are left unprescribed the essential duties of an assessor must

be presumed to have been contemplated. Is there not here a plain intention on the part of the people to preserve local control over the valuation of property for purposes of taxation? This local control existed under the territorial form of government under which they had been living, and is this not an effort to secure it beyond contingency?"

160 True, the increase ordered by the board is based upon the action and report of the commission increasing the valuations in the different counties. The latter, however, is not authorized to reassess by a horizontal raise,—so that the increase made by the board is not based upon an equalization of assessments but an increase in valuations made by the commission, which it is without authority to make as an assessment. This increase by the board is attempted to be upheld by the attorney-general upon the ground that the commission by its action merely collected data and furnished a statement to the board to aid it in performing its duties; that in this respect the commission acted in an advisory capacity; that from the information thus obtained the board determined that the valuations in each of the counties affected should be raised to a sum representing the cash value of the property involved. If this was the object of the statutory provisions under consideration, and they are to be given this construction, it is apparent that thereby an attempt was made by the General Assembly to confer authority upon an intermediary body to arbitrarily increase the aggregate valuations returned by the assessors and by having it transmit a report of this action to the board confer that authority upon the latter. The General Assembly can not by indirection accomplish that which the constitution directly inhibits. It can not authorize another body to increase the aggregate valuations as returned by the assessors with the requirement that this body report its action to the board vest the latter with power to do that which the constitution inhibits. It might just as well have undertaken to vest this authority in the state board in the first instance.

161 In my judgment every question necessary to consider was decided in the Lothrop case adversely to the contention of petitioner here, and, following that case, the alternative writ should be quashed and the proceedings dismissed.

In effect, the construction given the constitutional provision defining the powers of the board when acting in the capacity of a board of equalization, in the Lothrop case, made it a part of the constitution. It has been acquiesced in by the people for 36 years and after this lapse of time it must be conclusively presumed that they are satisfied with its provisions as thus construed and that this expressed their intent when adopted, otherwise they would have amended it. With due deference to my learned associates I submit that to uphold the action of the board necessarily overrules the Lothrop case and results in amending the fundamental law,—a power which the people alone can exercise.

Garrigues, J., dissenting:

I understand the majority opinion holds that the horizontal raise, which the assessor was ordered to add to his original assessment, is a local assessment; also it concedes that under the constitution the state board of equalization is prohibited from making local assessments, that its power is limited to equalizing between the counties; but in the exercise of this power, it cannot increase the aggregate value of all the co-nties. To escape this inhibition and uphold the action of the state board of equalization, the majority opinion is based upon the theory that the tax commission, and not the state board of equalization, added this horizontal raise, and the local assessment consists of the original assessment plus the horizontal raise, that is, in amount the local assessment is the assessor's original assessment plus the added horizontal raise, and the state board of equalization adopted as a means or incident of equalization, but did not make this assessment; therefore it neither made a local assessment nor increased in amount the aggregate of all the assessments.

This contention to prevail, must be in harmony with the statute and the facts. In other words, there must be a statute authorizing the tax commission to assess in this manner, and the facts must show it made the assessment. It seems to me the majority opinion assumed without authority, both these points. The only statute covering the matter is found in sections 31, 32 and 33, Laws of 1911, page 623, which provide,—if the tax commission shall be of the opinion that the assessor has not in his original assessment assessed the real and personal property of his country at its true cash value, it shall determine what increase by rate per cent, will
162 place the property on the assessment roll at its true cash value; that after it has done so, it shall transmit to the state board of equalization its determination, with a statement specifying the amount to be added; when this statement is received by the state board of equalization, it is made its duty to then examine the abstracts of assessment of each county submitted to it by the tax commission, and make a record of the board's, not the commission's action, on each abstract and certify the same to the assessor, who is required forthwith to add to the valuation of the real and personal property of his county the increase ordered, after it has been equalized by the state board.

There is nothing in these sections authorizing the tax commission to add to, or to order the assessor to add any amount to the original assessment, or to make a re-assessment or supplemental assessment by a horizontal raise, or in any manner, or to make any assessment of any kind, and, what is more, it did not do so. Let us follow what was actually done, and see if we can discover where the tax commission ordered this horizontal raise to be added, or made any assessment. In the opinion of the commission, the real and personal property of Denver county was not assessed by the assessor at its true cash value, and it found that a 40 per cent horizontal increase, if added to his assessment roll, would place the real and personal prop-

erty of the county on the roll at its true cash value. What did it then do As the statute required, it transmitted a statement of this finding to the state board of equalization, and its function in the premises was ended. It could do no more, and it did no more. The state board of equalization then began its work of equalizing, examined the abstracts of assessment of the counties as submitted by the tax commission, made a record of its action on the abstract of
163 each county, certified the same to the county assessor of Denver county, and ordered him forthwith to add 40 per cent to the original valuation of his county. Now under this statute, and these facts, who made the supplemental local assessment, the tax commission or the state board of equalization. Evidently the state board that ordered it, and I think the holding that it was made by the tax commission is a mere subterfuge that would not be tolerated by the courts in any ordinary business transaction. I therefore am of the opinion that the state board of equalization attempted to make local assessments in the 58 counties of the state, and that it increases the aggregate assessed valuation of all the property of the state by $178,000,000 in round numbers, both of which it is prohibited from doing, and in which respects its action was and is void.

164 And further, and on to-wit, February 13, 1914, a petition for Rehearing was filed in our Supreme Court, which is in words and figures following, to-wit:

165 In the Supreme Court of the State of Colorado.

No. 8208.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS, JAMES B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farras (as the Members of the State Board of Equalization); The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link (as Members of the Colorado Tax Commission), Plaintiffs in Error,

vs.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, and Clair J. Pitcher, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

Error to the District Court of the City and County of Denver.

Petition for Rehearing.

Comes now The Bi-Metallic Investment Company, one of the defendants in error, by Benedict & Phelps, its attorneys, and moves and petitions the court for a rehearing in the above entitled cause, and a re-examination of the questions and issues therein involved, for the reasons and upon the grounds following, that is to say:

First. That this court erred in giving and rendering a judgment

of reversal herein, and in not giving and rendering a judgment affirming the judgment and decree of the District Court.

Second. That this court erred in holding and adjudging
166 that the defendant in error, The Bi-Metallic Investment Company, was not entitled to the relief sought in said cause and given and granted by the District Court therein.

Third. That this court erred in sustaining the action of the plaintiffs in error, the State Board of Equalization and the Colorado Tax Commission, in increasing the valuations of property in the City and County of Denver, including the property of this defendant in error, for the purpose of taxation and assessment, and erred in not holding and adjudging that the action of the State Board of Equalization and the said the Colorado Tax Commission was null and void, and in excess of the power of said Tax Commission and said board, and in violation of the rights of this defendant in error.

Fourth. That this court likewise committed error in holding and adjudging that the defendant in error, The Bi-Metallic Investment Company, was not denied due process of law by the action of the Colorado Tax Commission and the State Board of Equalization, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and in violation of like provisions of the Constitution of the State of Colorado.

Fifth. That this court did further err in holding and adjudging that the defendant, The Bi-Metallic Investment Company, was not deprived of its right to notice and hearing of the raise in the assessed valuation of its property, and in failing to hold and adjudge that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States was denied to this defendant in error by the action of the Colorado Tax Commission and the State Board of Equalization set forth and referred to in the complaint in said action.

Sixth. That this court erred in not holding and adjudging
167 that this defendant in error was denied the equal protection of the law guaranteed by the provisions of the Fourteenth Amendment to the Constitution of the United States.

Seventh. That this court further erred in not holding and adjudging Chapter 216 of the Session Laws of Colorado of 1911, being an act creating the Colorado Tax Commission, etc. and the provisions thereof, to be unconstitutional, null, and void, and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and particularly and especially to the "due process of law" clause of said amendment.

Eighth. That this court did further err in its holding and judgment herein, in this, to-wit: in failing to hold and adjudge that, by the action of the said Colorado Tax Commission and the State Board of Equalization, the powers, functions and duties of the assessor of the City and County of Denver were usurped, contrary to law and contrary to the provisions of the Constitution of the State of Colorado.

Ninth. That the court erred in deciding and adjudging that the Colorado Tax Commission was a lawful body, with supervising powers and authority to direct the assessors of the various counties of the

state, including the respondent, to increase the valuation of assessable property in their respective counties.

Tenth. That the court erred in adjudging and deciding that the State Board of Equalization of the State of Colorado was vested with power to direct an increase in valuation of all the assessable property within the various counties of the state, including the City and County of Denver.

Eleventh. That the court erred in adjudging and deciding that a horizontal raise of assessed valuations on property within the
168 various counties of the state, including the City and County of Denver, was equivalent to an equalization of assessments of property within the counties.

Twelfth. That the court erred in adjudging and deciding that the Colorado Tax Commission was authorized by the laws of the State of Colorado to assess property in the various counties of the state by an increase in valuations over the valuations made by the assessors.

Thirteenth. That the court erred in holding that the Colorado Tax Commission, or in assuming that the Colorado Tax Commission, in the exercise of any powers conferred upon it, had complied with all the provisions of the acts of the legislative assembly of 1911 and 1913, when, as a matter of fact, by the pleadings in this proceeding the charge of neglect of duty and failure to comply with the provisions of the statute, and all laws in connection with the performance of any duties under the statutes, was made, and admitted to be true.

Fourteenth. That the court erred in adjudging and determining that under and by virtue of sections 31, 32 and 33 of the Laws of 1911, page 623, the Colorado Tax Commission was authorized to assess assessable property within the various counties of the state by an increase of the actual value of all the property in said counties, whereas, in truth and in fact, nothing contained in each or all of these sections authorizes the Colorado Tax Commission to add to, or to direct the assessors to add any amount to, the original assessment of the assessors of the various counties, by a horizontal raise.

Fifteenth. That the court erred in holding that the action of the Colorado Tax Commission and the State Board of Equaliza-
169 tion in thus increasing the assessable values of the property of the various counties of the state, including the City and County of Denver, without notice to the taxpayers, without an opportunity for the taxpayers to protest, without any hearing of any kind or character, was not violative of the Fourteenth Amendment of the Constitution of the United States, wherein it is provided that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Wherefore, said defendant in error, The Bi-Metallic Investment Company, moves and petitions the court, as aforesaid, for a rehearing herein, and for a reconsideration of the issues and questions involved in said cause, and that upon such rehearing the opinion heretofore rendered herein be withdrawn; that the judgment heretofore ren-

dered herein be set aside, and held for naught; and that the judgment of the District Court in said cause be in all things affirmed.

BENEDICT & PHELPS,
Attorneys for Defendant in Error
The Bi-Metallic Investment Company.

170 And further, and on to-wit, March 2, 1914, the following further order was entered of record in our Supreme Court, which is in words and figures following, to-wit:

No. 8208.

THE STATE BOARD OF EQUALIZATION et al., Plaintiffs in Error,
vs.
THE BI-METALLIC INVESTMENT COMPANY et al., Defendants in Error.

Error to the District Court of the City and County of Denver.

The Court having heretofore considered the petition for a rehearing filed in this matter, and as well the arguments of counsel thereon, and being now fully advised in the premises, doth order that said petition be, and the same is hereby, denied.

171 Filed in Supreme Court Feb. 2, 1914. James R. Killiam, Clerk.

No. 8200.

Upon Petition for Rehearing.

By Mr. Justice HILL:

Since filing my dissenting opinion, advance sheet No. 1, Vol. 137, Pacific Reporter, dated January 19th, has been received. Beginning at page 174 is reported the case of Idaho Tax Commission v. Board of Commissioners of Bannock County, wherein the supreme court of Idaho has held that by the language used in their act creating a tax commission and defining its duties, it was not intended to deprive any officer or board of the duties imposed upon them by the implied provisions of the constitution, or that the commission should usurp or perform the duties of the assessor or county board of equalization; that since their constitution provides a scheme or framework for the administration of their revenue laws the legislature cannot submit another or different scheme or method therefor; that to give the act this construction as contended for by the commission, would make it unconstitutional; that since the constitution provides a method or system for the assessment of property with the object and purpose of arriving at a uniformity of valuation and has designated certain officers to perform the duties relative thereto, it is beyond the power

of the legislature to take from such officers such duties; that the words "assessor" and county "board of equalization" as used in their constitution carry with them the powers usually conferred on officers or boards of like names. These conclusions are in harmony with the former declarations of this court. In Re Taxation of Mines,
171½ 9 Colo., 635, and In Re Opinion of Justices, 123 Pac., 660.

The construction which I have contended should be given to Section 31 of our act of 1911 relieves it of the constitutional objection pointed out by the Idaho court; while the construction given it by the majority makes it unconstitutional when tested by the reasoning in the Idaho case. As a further confirmation of the correctness of my former views sustained by the reasoning of the Idaho court, I call attention to the similarity of the provisions of their constitution and statutes and ours concerning the powers and duties of the assessor, the county and the state board of equalization.

172 No. 8200.

On Petition for Rehearing.

Mr. Justice GABBERT delivered the following opinion:

By the majority opinion unrestrained power is now vested in the tax commission to increase the valuations of each county by horizontal raise above the valuations returned by the assessor. By this means the aggregate valuation of the local officials has been enormously increased. There does not seem to be any limit to the increase which the commission may make. They say that this increase only brings the property in the several counties up to its cash value, but they are the sole judges of what constitutes such value. The control which the people have heretofore exercised over valuations through their local officials, which has never been questioned since the decision in the Lothrop case in 1877, is swept away and unlimited power to increase valuations vested in a central appointed body. It is only necessary to refer to one provision of our constitution to demonstrate that the General Assembly can not confer upon the tax commission the power which the majority opinion says it may exercise. The constitution provides that the rate of taxation for state purposes shall never exceed four mills on the dollar. The object of this is to protect the people from being burdened with state taxes beyond a fixed limit, but with unrestrained power vested in a central body to increase the valuations returned by the county assessors all that is necessary for them to do in order to avoid and set at naught the constitutional limit of the rate of taxation for state purposes is to make such increase. By the construction given the tax commission act the efforts of the people
172½ in their fundamental law to establish legitimate restraints on the power to tax are rendered unavailing and the checks and guards they have embodied in the constitution to that end cease to be of any force or value.

In my opinion the General Assembly can not confer upon a cen-

tral body the power to assess the real and personal property in the several counties. It may confer supervisory power upon such body, but the majority opinion goes to the full extent of holding that the unqualified power of assessment is conferred upon the tax commission. It is also my opinion that the authority of the state board of equalization is limited to reducing to a uniform basis the valuation returned by the local officials. If these assumptions are correct then a great injustice results to the taxpayers in the 58 counties where the valuations have been increased. This increase amounts to nearly $187,000,000.00. The state tax which will be realized from this great increase must be paid by the owners of real and personal property in these counties, while the public utility corporations, which includes all corporations like railroads, water, street railways, gas, telephone and telegraph companies, and all utility corporations having a continuity of business in two or more counties, whose property is assessed by the tax commission escape paying any portion of the tax resulting from such increase. Had the board of equalization equalized the valuations returned by the local officials without adding to their volume, then in order to raise the same revenue for state purposes which the present rate would bring in it would have been necessary to increase the per cent of the rate, but in that event the utility corporations would have been required to pay their proportion of the tax resulting from the increased rate which now the owners of real and personal property alone are required to pay.

A rehearing should be granted and judgment rendered quashing the writ and dismissing the proceedings.

173 Filed in Supreme Court Mar. 5, 1914. James R. Killian, Clerk.

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS, James B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar (as the Members of the State Board of Equalization); The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link (as Members of the Colorado Tax Commission), and Clair J. Pitcher, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

Assignment of Errors.

Comes now the said Plaintiff in Error and respectfully says that in the record proceedings, decision and final judgment of the Supreme Court of the State of Colorado in the above entitled matter, there is manifest and prejudicial error in this, to-wit:

I.

That said Supreme Court of the State of Colorado erred in giving and rendering judgment of reversal in said cause, and in not giving and rendering judgment affirming the judgment and
174 decree of the District Court of the Second Judicial District of said State of Colorado.

II.

That said Supreme Court of Colorado erred in holding and adjudging that The Bi-Metallic Investment Company, Plaintiff in Error herein, was not entitled to the relief sought by its Bill of Complaint in said cause, which relief was given and granted by the said District Court of the Second Judicial District; and said Supreme Court of Colorado likewise erred in directing the said District Court to dismiss the Bill of Complaint of The Bi-Metallic Investment Company aforesaid, at its cost.

III.

That said Supreme Court of the State of Colorado erred in sustaining the action of the State Board of Equalization and the Colorado Tax Commission, Defendants in Error herein, in increasing the valuations of property in the City and County of Denver, including the property of said The Bi-Metallic Investment Company, for the purpose of taxation and assessment, and erred in not holding and adjudging that the action of the State Board of Equalization and the Colorado Tax Commission aforesaid was null and void and in excess of the powers of said Tax Commission and said Board and in violation of the rights of The Bi-Metallic Investment Company, Plaintiff in Error herein.

IV.

That said Supreme Court of Colorado likewise erred in holding and adjudging that The Bi-Metallic Investment Company, Plaintiff in Error herein, was not denied due process of law by the action of the Colorado Tax Commission and the State Board of Equalization aforesaid, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

175 V.

That said Supreme Court of Colorado did further err in holding and adjudging that the plaintiff in error herein, The Bi-Metallic Investment Company, was not deprived of its right to notice and hearing of the raise in the assessed valuation of its property, and in failing to hold and adjudge that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States was denied to this Plaintiff in Error by the action of the Colorado Tax Commission and the State Board of Equalization, set forth and referred to in the record of said action.

VI.

That said Supreme Court of Colorado erred in not holding and adjudging that the plaintiff in error herein, to-wit, The Bi-Metallic Investment Company, was denied the equal protection of the law guaranteed by the provisions of the Fourteenth Amendment to the Constitution of the United States.

VII.

That said Supreme Court of Colorado further erred in not holding and adjudging Chapter 216 of the Session Laws of Colorado of 1911, as amended by Chapter 133 of the Session Laws of Colorado of 1913, and the provisions thereof, to be unconstitutional, null and void, and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and particularly and especially to the "due process of law" clause of said amendment.

VIII.

That the said Supreme Court of Colorado further erred in holding and adjudging that the action of the Colorado Tax Commission and the State Board of Equalization in increasing the assessed valuation of the property of this plaintiff in error and others, without notice and without opportunity to protest, without hearing of any
176 kind or character, was not violative of the Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no state shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

IX.

That the said Supreme Court of the State of Colorado did commit further error by its judgment and decision in said cause by giving to the revenue laws of the State of Colorado a construction bringing said revenue laws into conflict with the guaranties of the Fourteenth Amendment to the Constitution of the United States, and in sustaining the action of the State Board of Equalization in raising the assessed valuations of property for purposes of taxation without notice or hearing or any opportunity to the property owner to be heard.

Wherefore The Bi-Metallic Investment Company, plaintiff in error aforesaid, prays that the aforesaid judgment and decision of the Supreme Court of Colorado may be re-examined and may be reversed, annulled and altogether held for naught, and that said plaintiff in error may be restored all things which it has lost by the action, judgment and decision of the said Supreme Court of the State of Colorado.

THE BI-METALLIC INVESTMENT COMPANY, *Plaintiff in Error,*
By HORACE PHELPS,
Attorney for said Plaintiff in Error.

177 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

Filed in Supreme Court Mar. 5, 1914. James R. Killian, Clerk.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS, JAMES B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar (as the Members of the State Board of Equalization); The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link (as the Members of the Colorado Tax Commission), and Clair J. Pitcher, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

Petition of the Bi-Metallic Investment Company, a Corporation, for the Allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Colorado, Returnable into the Supreme Court of the United States. etc.

To the Honorable George W. Musser, Chief Justice of the Supreme Court of the State of Colorado:

Your Petitioner, The Bi-Metallic Investment Company, a corporation duly organized and existing under and by virtue of the Laws of the State of Colorado, respectfully represents and shows:

178 That on, to-wit, the 2nd day of February, A. D. 1914, the Supreme Court of the State of Colorado rendered a final judgment against your Petitioner in a certain cause wherein your petitioner was defendant in error and the above named, the State Board of Equalization, and Elias M. Ammons, James B. Pearce, M. A. Leddy, Roady Kenehan and Fred Farrar (as the members of the State Board of Equalization), The Colorado Tax Commission and John B. Phillips, J. Frank Adams and Celsus P. Link (as members of the Colorado Tax Commission), were plaintiffs in error, in and by which said final judgment a certain judgment and decree theretofore rendered and entered in and by the District Court of the Second Judicial District of the said State of Colorado was in all things reversed and said District Court of the Second Judicial District was directed to dismiss the Bill of Complaint of your Petitioner, The Bi-Metallic Investment Company, thereby denying your petitioner the relief sought in and by its Bill of Complaint, and finally adjudging that your Petitioner was not entitled to the relief thereby sought, all of which will more fully appear by reference to the record of proceedings in said cause, to which reference is hereby made and had; and that the said the Supreme Court of the State of Colorado is the highest court of said State in which a decision in said suit can be had.

And your Petitioner claims the right to remove said judgment of the Supreme Court of the State of Colorado into the Supreme Court of the United States by Writ of Error under Section 237 of the Act of Congress to qualify, revise and amend the laws relating to the judiciary, approved March 3, 1911, and designated "The Judicial Code" because in the aforesaid suit is and was drawn in question by your Petitioner the validity of a certain statute of the State of
179 Colorado, to-wit Chapter 216 of the Session Laws of Colorado of the year 1911, and an act amendatory thereof, to-wit, Chapter 133 of the Session Laws of Colorado of the year 1913, on the ground of their being repugnant to the Fourteenth Amendment to the Constitution of the United States and to the provisions thereof, and in and by said suit there is and was likewise drawn in question an authority exercised by said State of Colorado by and through the said State Board of Equalization and the Colorado Tax Commission, in pursuance of said statutes, and the decision of said Supreme Court of the State of Colorado is and was in favor of the validity of said statutes and of the authority exercised in pursuance thereof. And in said cause your petitioner The Bi-Metallic Investment Company, likewise claimed a certain right, privilege and immunity under the constitution of the United States, to-wit, the right to due process of law in and about the assessment and taxation of its property, and the equal protection of the laws as guaranteed by the said Fourteenth Amendment to the Constitution of the United States, and the said decision of the said Supreme Court of the State of Colorado is and was against the said right, privilege and immunity so claimed. That in said cause your petitioner The Bi-Metallic Investment Company aforesaid did especially set up, and claim, in and by its Bill of Complaint in said action, that certain acts and doings of the Colorado Tax Commission aforesaid and of the State Board of Equalization aforesaid, in raising and increasing the valuation of the property of your petitioner for purposes of assessment and taxation without notice or hearing and without opportunity to be heard, were in violation of the rights of your petitioner under the Fourteenth Amendment to the Constitution of the United States aforesaid, and constituted a deprivation of the property of your petitioner without due process of law, contrary to the provisions of the Fourteenth Amendment aforesaid.

That on to-wit, the 2nd day of March, A. D. 1914, the said
180 Supreme Court of the State of Colorado did, in the suit and proceeding aforesaid, deny the application and petition of your petitioner The Bi-Metallic Investment Company, for a rehearing of said cause, whereby the judgment of said Supreme court of Colorado in said cause became final.

That the right, privilege and immunity especially set up and claimed by your petitioner, all of which will more fully appear by the record of the proceedings in said cause, to which reference is hereby made and had, arises in the following manner, to-wit:

That the said the Colorado Tax Commission did claim and assert the power and authority to make a raise and increase in the valuation of real property owned by your petitioner and situate in the

City and County of Denver in the State of Colorado after the valuation and assessment thereof had been made by the Assessor of the said City and County of Denver, and in pursuance of such claim of power and authority the Colorado Tax Commission aforesaid did increase and raise the valuation of said real property and did recommend to said the State Board of Equalization such increase in the valuation of said real property and all other property similarly situate in the City and County of Denver aforesaid. That thereafter the said State Board of Equalization, assuming and pretending to act upon the recommendation of said Colorado Tax Commission, did raise and increase the valuation of said real property and make a certain order requiring the Assessor of said City and County of Denver to extend said increased valuation upon the tax rolls of said City and County of Denver. That each and all of the acts done and proceedings had by the said Colorado Tax Commission and the said State Board of Equalization, were had and done without any notice to your petitioner and without opportunity to your petitioner to be heard, and did and will result in increasing the as-
181 sessed valuation of the property of your petitioner far in excess of the true and full cash value thereof. Whereupon your petitioner instituted its action in the District Court of the Second Judicial District of the State of Colorado, seeking to enjoin the consummation of said action of the said State Board of Equalization and Colorado Tax Commission, and in its Bill of Complaint in said action your petitioner did especially set up and claim its rights privileges and immunities under the said Fourteenth Amendment to the Constitution of the United States, and did in and by its Bill of Complaint in said action draw in question the validity of the authority exercised under the Laws of the State of Colorado by the Colorado Tax Commission and the State Board of Equalization on the ground of their being repugnant to the Fourteenth Amendment to the Constitution of the United States and upon hearing duly had in said District Court your petitioner had final judgment and decree granting all and singular the relief by it sought in and by its said action. That thereafter such proceedings were had that the said judgment and decree of the said District Court was re-examined upon Writ of Error by the Supreme Court of the State of Colorado. That said Supreme Court did reverse said judgment and decree of the said District Court and direct the dismissal of plaintiff's bill of complaint aforesaid, thereby denying to your petitioner the right, privilege and immunity especially set up and claimed under the Fourteenth Amendment as aforesaid, giving decision against your petitioner and in favor of the validity of the Statutes of the State of Colorado hereinabove referred to, and giving decision in favor of the validity of the authority exercised under the Laws of the State of Colorado by said Colorado Tax Commission and said State Board of Equalization. And your petitioner has duly raised, presented and argued its claims and contentions with respect to the matters and things aforesaid, both in said District Court and in said Supreme Court of the
182 State of Colorado, as will more fully appear from the records of the proceedings had in said cause.

Wherefore, your petitioner prays the allowance of a Writ of Error returnable unto the Supreme Court of the United States and for citation, and your petitioner will ever pray, etc.

THE BI-METALLIC INVESTMENT COMPANY, *Petitioner,*
By HORACE PHELPS,
Attorney for Petitioner.

The Writ of Error as prayed is hereby allowed.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of the State of Colorado.

183 In the Supreme Court of the State of Colorado.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS, JAMES B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar (as the Members of the State Board of Equalization); The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link (as Members of the Colorado Tax Commission), Plaintiffs in Error,

vs.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, and CLAIR J. Pitcher, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

Bond.

Know all men by these presents that we, The Bi-Metallic Investment Company, a corporation duly organized and existing under and by virtue of the Laws of the State of Colorado, as principal, and the Maryland Casualty Company, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and doing business under the laws of the State of Colorado, as surety, are held and firmly bound unto the State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Roady Kenehan and Fred Farrar (as the members of the State Board of Equalization); the Colorado Tax Commission and John B. Phillips,
184 J. Frank Adams and Celsus P. Link, (as members of the Colorado Tax Commission), and Clair J. Pitcher as Commissioner of Finance and Ex-officio Assessor of the City and County of Denver, in the sum of One Thousand Dollars, to be paid to said obligees, their successors, representatives and assigns, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 5th day of March, A. D. 1914.

Whereas the above named The Bi-Metallic Investment Company, has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Colorado,

Now, Therefore, the condition of this obligation is such that if the

above named The Bi-Metallic Investment Company shall prosecute its said Writ of Error to effect and answer all costs, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE BI-METALLIC INVESTMENT COMPANY,
By JEROME S. RICHE,
Its Vice President.

Attest:
JULIUS A. MYERS,
Secretary.

MARYLAND CASUALTY COMPANY,
By JOHN R. GEMMILL,
Its Attorney in Fact.

Signed, sealed and delivered in the presence of
EDSIN J. WITTELSHOFER.

185 I hereby approve the foregoing bond and surety this 5th day of March, A. D. 1914.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of the State of Colorado.

186 Filed in Supreme Court Mar. 5, 1914. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 8208.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS, JAMES B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar (as the Members of the State Board of Equalization); The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link (as Members of the Colorado Tax Commission), Plaintiffs in Error,

vs.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, and CLAIR J. Pitcher, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

Order.

The above entitled matter coming on to be heard upon the petition of The Bi-Metallic Investment Company, defendant in error, for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Colorado, and upon the examination of the said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Su-

preme Court of the United States the questions presented by the record in said matter,

It is hereby ordered that a Writ of Error as prayed be and the same is hereby allowed to the Supreme Court of Colorado from the Supreme Court of the United States, and that the same issue forthwith.

187 Dated at Denver, Colorado, this 5th day of March, A. D. 1914.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of the State of Colorado.

188 Filed in Supreme Court Mar. 5, 1914. James R. Killian, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Colorado before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Roady Kenehan and Fred Farrar (as members of the State Board of Equalization); the Colorado Tax Commission and John B. Phillips, J. Frank Adams and Celsus P. Link (as members of the Colorado Tax Commission), plaintiffs in error, and The Bi-Metallic Investment Company, a corporation, and Clair J. Pitcher, as commissioner of Finance and ex-officio Assessor of the City and County of Denver, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Bi-Metallic Investment Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in

189 this behalf, do command you, if judgment be therein given, that then and under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to cor-

rect that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 5th day of March, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk of the United States District Court
for the District of Colorado.

Allowed by
GEORGE W. MUSSER,
Chief Justice of the Supreme Court
of the State of Colorado.

190 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Colorado, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Colorado, in the City of Denver, this March —, 1914.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk Supreme Court of Colorado.

Costs of this transcript $92.20 paid by The Bi-Metallic Investment Co.

191 Filed in Supreme Court Mar. 5, 1914. James R. Killian, Clerk.

To the State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar (as Members of the State Board of Equalization); The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link, (as Members of the Colorado Tax Commission), and Clair J. Pitcher, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Colorado,

wherein The Bi-Metallic Investment Company is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Musser, Chief Justice of the Supreme Court of the State of Colorado, this 5th day of March, A. D. 1914.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of the State of Colorado.

Service of a copy of the within citation is hereby accepted and admitted March 7th, 1914.

FRED FARRAR,
Attorney General, State of Colorado, for the State Board of Equalization and the Colorado Tax Commission.

192 Filed in Supreme Court Mar. 5, 1914. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

THE STATE BOARD OF EQUALIZATION and ELIAS M. AMMONS, JAMES B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar (as the Members of the State Board of Equalization); The Colorado Tax Commission and John B. Phillips, J. Frank Adams, and Celsus P. Link (as Members of the Colorado Tax Commission), Plaintiffs in Error,

vs.

THE BI-METALLIC INVESTMENT COMPANY, a Corporation, and CLAIR J. PITCHER, as Commissioner of Finance and ex-Officio Assessor of the City and County of Denver, Defendants in Error.

The above entitled matter coming on to be heard upon the application of The Bi-Metallic Investment Company for the approval of its bond and security upon Writ of Error from the Supreme Court of the United States to review the judgment and decision of the Supreme Court of Colorado in the above entitled action,

It is hereby ordered that the bond presented by said petitioner in the sum of One Thousand Dollars for costs only be and the same is hereby approved.

Dated at Denver, Colorado, this 5th day of M'ch A. D. 1914.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of the State of Colorado.

193 *Certificate of Lodgment.*

SUPREME COURT,
State of Colorado, ss:

I, James R. Killian, clerk of the said court, do hereby certify that there was lodged with me as such clerk on March 5, 1914, in the matter of The State Board of Equalization et al. versus The Bi-Metallic Investment Company, a corporation, et al.;

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the Defendants in Error, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Denver, Colorado, this 26" day of March, 1914.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk Supreme Court of Colorado.

194 STATE OF COLORADO:

In the Supreme Court.

I, James R. Killian, Clerk of said Court, do hereby certify that the foregoing pages containing folios 1 to 581 *is* a full true and complete transcript of the record and proceedings in the case of The State Board of Equalization et al., plaintiffs in error, vs. The Bi-Metallic Investment Company et al., defendants in error, (No. 8208 on the docket of said court), and also of the opinion of the Court rendered therein, as the same now appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Denver, this 26th day of March, A. D. 1914.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court of the State of Colorado.

Endorsed on cover: File No. 24,139. Colorado Supreme Court. Term No. 116. The Bi-Metallic Investment Company, plaintiff in error, vs. The State Board of Equalization and Elias M. Ammons, James B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar, as members, &c., et al. Filed March 31st, 1914. File No. 24,139.

SUBJECT INDEX

	Page
Statement of the Case	1
Errors Specified	15
Brief of the Argument	18-31
Subdivision I (Questions Involved)	18
Subdivision II (Notice of Reassessment Required)	18
Subdivision III ("Due Process"—Requirements of)	19
Subdivision IV (Reassessment Involved)	19
Subdivision V (Notice of Reassessment Essential)	20
Subdivision VI (Action of State Board Violated Fourteenth Amendment)	20
Subdivision VII (Sections 31, 32, and 33, Act of 1911, Void)	21
Conclusion—VIII	30

CASES CITED AND REFERRED TO

	Page
Barnard ex rel. vs. Wemple, 117 N. Y., 77	20
Bellingham Co. vs. New Whatcom, 172 U. S., 314	20
Carney vs. People, 210 Ill., 434	19
Central of Ga. Ry. Co. vs. Wright, 207 U. S., 127	20
Davidson vs. New Orleans, 96 U. S., 97	20
Douglass vs. Westchester Co., 172 N. Y., 309	19
Gale vs. Statler, 47 Colo., 72	20
Gray, Limitations of Taxing Power, sec. 1295	19, 20
Hagar vs. Reclamation District, 111 U. S., 701	18
In re Questions of Governor, 55 Colo., 17	11
Kuntz vs. Sumption, 117 Ind., 1	19, 20
Londoner vs. Denver, 210 U. S., 373	19, 26
Myers vs. Shields, 61 Fed., 713	20
Overing vs. Foote, 65 N. Y., 263	19
People vs. Ins. Co., 246 Ill., 442	19
People vs. Lothrop, 3 Colo., 428	2
People ex rel. vs. Pitcher, 56 Colo., 343	4
Roller vs. Holly, 176 U. S., 398	19
Security Trust Co. vs. Lexington, 203 U. S., 323	19
State Board of Equalization vs. Bi-Metallic Inv. Co., 56 Colo., 512	4
State Revenue Agent vs. Tonella, 70 Miss., 701	20
Stuart vs. Palmer, 74 N. Y., 183	19
Tolman vs. Salomon, 191 Ill., 202	19
Weyerhauser vs. Minnesota, 176 U. S., 550	18

CONSTITUTIONAL AND STATUTORY PROVISIONS REFERRED TO

	Page
Colorado Constitution, Art. V, sec. 35	3
Colorado Constitution, Art. XIV, sec. 8	4
Colorado Constitution, Art. X, sec. 15	4
Colorado Constitution, Art. X, sec. 11	5
Revised Statutes of Colorado, 1908, sec. 5764	5
Revised Statutes of Colorado, 1908, sec. 5767	5
Revised Statutes of Colorado, 1908, sec. 5761	6
Revised Statutes of Colorado, 1908, sec. 5636	6
Revised Statutes of Colorado, 1908, sec. 5659	6
Revised Statutes of Colorado, 1908, sec. 5628	6
Revised Statutes of Colorado, 1908, sec. 5638	6
Revised Statutes of Colorado, 1908, sec. 5639	6
Revised Statutes of Colorado, 1908, sec. 5640	6
Revised Statutes of Colorado, 1908, sec. 5641	6
Revised Statutes of Colorado, 1908, sec. 5630	6
Session Laws of Colorado, 1911, Chap. 216	6
Session Laws of Colorado, 1911, p. 612, secs. 13, 31, 32, 33	8, 21
Session Laws of Colorado, 1913, Chap. 133	11

(24,139)

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1915.

No. 116.

THE BI-METALLIC INVESTMENT COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE BOARD OF EQUALIZATION, THE COLORADO TAX COMMISSION, ET AL., DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On October 28, 1913, The Bi-Metallic Investment Company, plaintiff in error here, filed its complaint, in the nature of a bill in equity, in the District Court

of the state. The purpose of the action was to enjoin the State Board of Equalization and the Colorado Tax Commission, defendants in error, from putting in force, and the defendant Pitcher, in his capacity as assessor of Denver, from obeying, an order of one or both of those boards requiring defendant in error Pitcher, as assessor of the City and County of Denver, to make a horizontal increase of 40 per cent in the valuations of all taxable property in Denver as fixed by him in his assessment roll for the year 1913.

The theory of the complaint was that the boards in question were exceeding their authority and jurisdiction in ordering the raise in valuation—

First—Because it had been held in an early case in Colorado (People ex rel. vs. Lothrop, 3 Colo., 428) that the State Board of Equalization, in its duty of equalizing and adjusting values for purposes of taxation as between the several counties of the state, could not raise the aggregate of the values fixed by the assessors of the various counties of the state—a thing which had been done as a part of the action of the above boards when ordering the 40 per cent increase of assessed valuation in Denver in 1913.

Second—Because the mode pursued and steps taken by the State Board of Equalization and the Colorado Tax Commission operated to deprive plaintiff in error and other property-owners in Denver of all notice and all opportunity to be heard concerning the increase in valuation, and hence as to them the action taken amounted to a taking of property by the state without due process of law, and a denial of the equal protection of the laws, in violation of the pro-

visions of the Colorado Constitution and the Fourteenth Amendment to the Constitution of the United States.

Third—Because, under a specific constitutional provision (sec. 35, Art. V, of the Colorado Constitution), the powers asserted and sought to be exercised by the State Board of Equalization and the Tax Com mission were such as the legislature of the state was expressly forbidden to delegate.

Issue of law was joined in the trial court by plaintiff's demurrer to the answer of the State Board of Equalization and the Colorado Tax Commission, and the demurrer of defendant Pitcher to plaintiff's complaint. Upon hearing, the injunctive relief prayed by the bill was granted. The case then went to the Supreme Court of the state by writ of error. In the meantime the State Board of Equalization and the Colorado Tax Commission had begun an original proceeding in mandamus in the Supreme Court of the state to compel Pitcher, the assessing officer of Denver, to comply with the order of the state boards requiring him to make and extend the increase of 40 per cent on his assessment roll.

By stipulation the two cases—that is, the original proceeding in mandamus and the writ of error to review the decree of the trial court in the injunction case—were argued and submitted together in the Supreme Court of the state. That court, on final hearing, awarded a peremptory writ of mandamus in the one case, directing the increase to be made by the assessor, and reversed the decree of the trial court in the injunction case, with direction to dismiss the bill of complaint of The Bi-Metallic Investment Company.

Petitions for rehearing were presented in each of the cases, and denied.

The People ex rel. vs. Pitcher, 56 Colo., 343.

State Board of Equalization et al. vs. The Bi-Metallic Investment Co. et al., 56 Colo., 512.

The Bi-Metallic Investment Company then sued out the present writ of error under section 237 of the act of Congress approved March 3, 1911, relating to the judiciary, to review the judgment of the Supreme Court of Colorado in the injunction case.

Before making a detailed statement of the averments of the complaint in the case, it seems best to refer to certain provisions of the Colorado Constitution and Colorado Statutes bearing upon the revenue system of that state.

By Article XIV, section 8, of the Constitution of Colorado, certain county officers are provided for, and among others one "county assessor." His duties are not prescribed by the Constitution. Under the commission form of government now in force in the City and County of Denver, the duties of assessor are performed by the commissioner of finance, he being ex officio the assessor of the City and County of Denver.

By Article X, section 15, of the Colorado Constitution, there are created certain boards—a State Board of Equalization and a County Board of Equalization in each county. This section is as follows:

> "There shall be a state board of equalization, consisting of the governor, state au-

ditor, state treasurer, secretary of state and attorney general, also, in each county of this state, a county board of equalization, consisting of the board of county commissioners of said county. The duty of the state board of equalization shall be to adjust and equalize the valuation of real and personal property among the several counties of the state. The duty of the county board of equalization shall be to adjust and equalize the valuation of real and personal property within their respective counties. Each board shall also perform such other duties as may be prescribed by law."

In the City and County of Denver, under the commission form of government, the five commissioners of the city constitute a council and perform the duties of the county board of equalization.

Article X, section 11 of the state Constitution limits the rate of taxation for state purposes to 4 mills on each dollar of valuation.

Section 5764, Revised Statutes of Colorado, 1908, provides that the State Board of Equalization shall sit on the first Monday of October in each year for the purpose of examining, adjusting, and equalizing the assessments in the several counties of the state.

Section 5767, Revised Statutes of Colorado, 1908, requires that the State Board of Equalization shall complete its labors on or before the third Monday of October in each year, and shall fix the rate of levy, not exceeding the constitutional limit, etc.

Section 5761, Revised Statutes of Colorado, 1908, fixes the time of meetings of the county board of equalization in each county. Two regular meetings are required—one commencing the first Tuesday in September and continuing not less than three nor more than ten consecutive days, and the second on the third Tuesday in September, continuing not less than two nor more than ten consecutive days. Provision is made for extending the time of these meetings, not to exceed ten days in any case.

Section 5636, Revised Statutes of 1908, gives the State Board of Equalization power in certain cases to require the county assessor to make corrections and additions to his assessment.

Sections 5659 and 5628 require the assessors to present to the auditor of the state on or before September 1 of each year an abstract of assessment, showing certain facts with reference to the assessment in each county.

Section 5638 prescribes the duties and limits the powers of county boards of equalization.

Sections 5639, 5640, and 5641 provide for hearings of taxpayers by the assessor and appeals from his decisions.

Section 5630 vests in the State Board of Equalization power to assess certain enumerated public utilities. By act of the legislature in force at the time this suit was instituted, this power of original assessment had been transferred to the Colorado Tax Commission.

Prior to the year 1911, when the Colorado Tax Commission was created by act of the legislature (Session Laws of 1911, Chap. 216), the revenue system of Colorado, in so far as it related to property

located wholly within a single county, was substantially as follows:

First—Assessment by the county assessor.

Second—Objection of the taxpayer, if any, to the assessment.

Third—Appeal by the taxpayer from the decision of the assessor.

Fourth—Completion of the assessment roll by the assessor prior to September 1 of each year, at which time his control and jurisdiction terminated.

Fifth—Two sittings of the county board of equalization in September of each year to adjust and equalize values, etc., as between property-owners in the county.

Sixth—From October 6 to October 20 of each year sitting of the State Board of Equalization to adjust and equalize valuations as between the various counties of the state.

Prior to the statute of 1911 creating the Tax Commission, the State Board of Equalization had and exercised no power to revise the work of the assessor, except in certain limited cases; had and exercised no power of original assessment or reassessment, except in the case of public utilities. In its work of equalization the board had no power to raise the total valuation of property in the state as shown by the abstracts of assessment furnished by the various assessors, but was required to and did add and deduct so as to leave the aggregate or total untouched. (It should perhaps be stated that during a brief period there was in force a statute of the state permitting the board, as an incident to equalization, to make a slight per cent of increase or decrease; but this statute was afterwards

repealed.) In this system or scheme of taxation there was harmony of provision, and the acts of the various officers charged with the execution of the statutory provisions followed an orderly course as to the time of performance.

In 1911 the act creating the Tax Commission was passed by the Colorado legislature (Session Laws of 1911, p. 612). This Tax Commission is a board consisting of three members appointed by the governor and state treasurer acting jointly. The act fixes the terms of office, and the salary and qualification of members; requires the board to organize, keep records, etc. It also confers certain general powers, not necessary to be stated here. The sections of the act which have particular bearing on this case are the following:

> "Section 13, subdivision sixth: Whenever in the judgment of the Tax Commission, property in any County or Municipal subdivision thereof has not been assessed at its true and full cash value, the Commission may make a reappraisement of the property therein, to the end that all classes of property in such taxing district shall be assessed in compliance with the law. When a reappraisement is ordered in any taxing district the Commission shall appoint an appraiser and assistant appraisers if necessary who shall forthwith proceed to appraise such property in such taxing district, and who shall have all the powers, shall perform all the duties pertaining to the appraisement of property and shall receive the same compensation from the same

sources as provided by law for Assessors of real or personal property as the case may be. It shall require County Assessors to place upon the assessment roll any property which may be found to have, for any reason, escaped assessment and taxation.

Section 13, subdivision seventh: The commission may raise or lower the assessed value of any real or personal property, first giving notice to the owner or owners thereof, fixing a time and place for hearing any person or persons interested to the end that the assessment laws of the State may be equitably administered, and said hearing shall be held within the County in which said property is situated."

"Section 31. Duty of the Commission. The Commission shall, on or before the first day of October following, determine whether the real and personal property of the several Counties in the State shall have been assessed at its true and full cash value, and if, in the opinion of said Commission the real or personal property within any County in the State as reported by said County Assessor to the said Commission is not on the assessment roll at its true and full cash value, the said Commission shall determine the increase or decrease in the valuation in such county by such rate per cent, or such amount as will place said property on the assessment roll at its true and full cash value.

Section 32. Statement to the State Board of Equalization. When the Commission has determined the true value of the real and personal property in the several Counties, the Commission shall transmit to the State Board of Equalization a statement of the amount to be added to or deducted from the valuation of the real and personal property of each County, specifying the amount to be added to or to be deducted from the valuation of the real or personal property.

Section 33. Duty of the State Board of Equalization. It shall be the duty of the State Board of Equalization to examine the abstracts of assessment as submitted by the State Tax Commission and the State Board of Equalization shall forthwith examine the abstract of assessment of each County as submitted by the State Tax Commission and make a record of its action on the abstract of each County and certify the same to the County Assessor, and the County Assessor shall forthwith add to or deduct from each tract or lot, and its improvements, of real property and all personal property in his County the required per cent, or amount on the valuation thereof as it stands after it has been equalized by the State Board of Equalization, adding or deducting in each case any sum less than five dollars so that the value of any separate tract or lot and its improvements shall be ten dollars or some multiple thereof."

In 1913 the legislature amended sections 40 and 41 of the act of 1911 (Session Laws of 1913, Chap. 133, pp. 525, 526). These sections are not material here, except to the extent that they transfer and vest in the Tax Commission all powers of original assessment theretofore exercised by the State Board of Equalization; in other words, the assessment of public utilities became the duty of the Tax Commission instead of the Board of Equalization.

In re Questions of the Governor, 55 Colo., 17.

The foregoing is intended to be a summary of statutory and constitutional provisions in force at the time of the filing of the complaint of The Bi-Metallic Investment Company, and of the doing of the acts therein complained of.

The complaint (Transcript of Record, fols. 5-15, pp. 2-8) alleges in substance:

The corporate existence of the plaintiff; that it is a taxpayer in the City and County of Denver; the existence of the State Board of Equalization by virtue of constitutional provision, and of the Colorado Tax Commission by virtue of statutory provision; the official position of Clair J. Pitcher as commissioner of finance and ex-officio assessor of Denver; plaintiff's ownership of certain described real property in Denver known as the Tabor Opera House Block; the making of an assessment of real and personal property by Pitcher as assessor, and the placing by him in his assessment of a valuation of $802,000 upon the described property of plaintiff for the year 1913; that this valuation was excessive; that Pitcher, however, refused to

reduce it; that afterward Pitcher swore to and produced his abstract of assessment, and transmitted the same to the Colorado Tax Commission on or before the first Monday in September, 1913, showing therein that the total and aggregate valuation of all real and personal property of Denver, assessed by him as assessor, was $254,755,220; that the various assessors of the state likewise filed abstracts of assessment, from which it appeared that the total valuation of all real and personal property in Colorado assessed by the assessors was $859,743,039; that the Tax Commission, after receiving these abstracts of assessment, held meetings, assumed and pretended to examine these abstracts of assessment and to determine whether the property of the state had been assessed by the assessors at its true and full cash value, and afterwards assumed and pretended to find and determine that the valuation of all taxable property in Colorado exceeded the aggregate shown by the abstracts of assessment, and that the total value of all property in Colorado subject to taxation by assessors was $1,046,294,697, being $186,551,658 in excess of the aggregate shown by the abstracts of assessment furnished by the assessors.

It was further alleged that the Tax Commission assumed to find and determine that the total valuation of Pitcher's assessment was erroneous and improper, and less than the full cash value of all the taxable property in Denver; and assumed to find and determine that the true valuation of property in Denver subject to assessment by the assessor was $356,657,308, or $101,902,088 in excess of Pitcher's valuation; that this conclusion of the Tax Commission was on October 6, 1913, transmitted to the State Board of Equaliza-

tion, which met on that date and continued in session until October 20, 1913, upon which last-mentioned date, upon recommendation of the Tax Commission, the State Board passed a resolution assuming to increase the total valuation of taxable property in many counties of the state as shown by the abstracts of assessment furnished by the various assessors, and assumed to increase the total value of all taxable property in the state subject to assessment by assessors, from $859,743,039 to $1,046,294,697, making a total increase of $186,551,658; that among other increases attempted to be made by the State Board was an increase in the valuation of Denver property from $254,755,220 to $356,657,308, making an increase of $101,902,088, the rate per cent of said increase being 40 per cent.

Then follow allegations that notice of the action taken by the State Board of Equalization was given Pitcher, and he was ordered and directed to add the above increase in valuation to his assessment roll, and thus, as the bill alleges, arbitrarily and unreasonably to increase the valuation of all taxable property in Denver 40 per cent over the valuation thereof as theretofore fixed and determined by Pitcher acting as assessor.

It is then alleged that Pitcher, as assessor, will, if compelled to, comply with the demand of the State Board and Tax Commission, make a horizontal raise of 40 per cent in the valuation of plaintiff's property, raising it to $1,122,800 without notice to plaintiff, and without opportunity for the plaintiff to be heard, whereby the valuation of the property of the plaintiff for purposes of taxation will be fixed at not less than $500,000 in excess of its real and full cash value. The

action of the Tax Commission is then alleged to have been without notice to the plaintiff, and without giving plaintiff, or others in like situation, any opportunity to be heard; that the attempt of the Tax Commission to make the raise or increase in valuation of plaintiff's property was and is null and void, and an attempt to deprive plaintiff, and others in like situation, of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and similar provisions of the Colorado Constitution. The same allegation is made with respect to the action of the State Board of Equalization.

The complaint further attacks the act of June 2, 1911, creating the Tax Commission, as in violation of certain provisions of the state Constitution, and contains averments showing that the time of the sitting of the county board of equalization had expired, so that no relief could be obtained from that board. There are other allegations showing need for equitable relief; and the bill closes with a prayer for injunctive and other proper relief.

To this complaint the defendant boards filed answer (Transcript of Record, fols. 18-30, pp. 10-18). This answer was divided into two defenses, the first of which substantially admits the facts alleged in the complaint, but denies the legal effect of those facts, and the pleader's deductions therefrom. The answer also challenges the sufficiency of the complaint. The second defense contained in the answer was denominated a cross-bill against the defendant Pitcher. It is not deemed essential to give the contents of this part of the pleading at this point, and it seems sufficient to say that it covered a phase of the controversy which

was later more fully gone into in the original proceeding in mandamus in the Supreme Court of the state.

By stipulation (Transcript of Record, fol. 57, pp. 33, 34) the complaint was amended so as specifically to allege non-compliance by the Tax Commission with the provisions of paragraph 7 of section 13 of the act of 1911.

Plaintiff demurred to the answer of the state boards (Transcript of Record, fol. 34, p. 21); defendant Pitcher answered the so-called cross-bill of the state boards (Transcript of Record, fols. 36-55, pp. 22-32); to this answer the state boards filed demurrer (Transcript of Record, fol. 59, pp. 34, 35); defendant Pitcher demurred to plaintiff's complaint (Transcript of Record, fol. 16½, p. 9).

On the 10th day of November, 1913, the trial court, upon a hearing of the various issues of law, entered its decree, awarding injunctive relief in accordance with the prayer of the complaint (Transcript of Record, fols. 62½-64, pp. 37, 38).

The further history of the litigation was as heretofore outlined.

SPECIFICATION OF ERRORS RELIED UPON.

The errors specified and relied upon are nine in number, as follows:

1. That the Supreme Court of Colorado erred in its judgment of reversal and in not affirming the decree of the District Court of the Second Judicial District of the state.

2. That the Supreme Court of the state erred in adjudging plaintiff in error not entitled to the relief sought by its bill of complaint and in directing a dismissal of said bill of complaint.

3. That the court erred in sustaining the action of the State Board of Equalization and the Tax Commission in increasing the valuations of property in Denver, including that of The Bi-Metallic Investment Company, for the purpose of taxation and assessment, and in not adjudging the action of said boards to be null and void, and in excess of their power, and in violation of the rights of The Bi-Metallic Investment Company.

4. That the Supreme Court of Colorado erred in holding and adjudging that The Bi-Metallic Investment Company, plaintiff in error herein, was not denied due process of law by the action of the Tax Commission and the State Board of Equalization, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

5. That error was committed in holding and adjudging that plaintiff in error was not deprived of its right to notice and hearing of the raise in the assessed valuation of its property, and in failing to hold and adjudge that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States was denied to plaintiff in error by the action of the Tax Commission and the State Board of Equalization, set forth and referred to in the record in the action.

6. That the court erred in not holding that the plaintiff in error was denied the equal protection of the law guaranteed by the Fourteenth Amendment.

7. That the court further erred in not adjudging Chapter 216 of the Session Laws of Colorado of 1911, as amended by Chapter 133 of the Session Laws of Colorado of 1913, and the provisions thereof, to be unconstitutional, null, and void, and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and particularly and especially to the "due process of law" clause of said amendment.

8. That the Supreme Court of Colorado further erred in holding and adjudging that the action of the Colorado Tax Commission and the State Board of Equalization in increasing the assessed valuation of the property of this plaintiff in error and others, without notice and without opportunity to protest, without hearing of any kind or character, was not violative of the Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

9. That the Supreme Court of Colorado further erred in its judgment and decision in said case, by giving to the revenue laws of the State of Colorado a construction bringing said revenue laws into conflict with the guarantees of the Fourteenth Amendment to the Constitution of the United States, and in sustaining the action of the State Board of Equalization in raising the assessed valuation of the property for the purpose of taxation, without notice or hearing or any opportunity to the property-owner to be heard.

BRIEF OF THE ARGUMENT.

I.

There seems to be no need to attempt a separate discussion of each assignment of error. Indeed, there is but one question involved upon this writ of error. Other questions raised and presented in the Supreme Court of the state are foreclosed by the decision of that court, because not of a federal nature.

Broadly stated, the contention of plaintiff in error is that the construction put upon the revenue laws of the State of Colorado by the Supreme Court of that state brings those laws into conflict with the guaranty of the Fourteenth Amendment to the Constitution of the United States as to due process of law; that there was, therefore, state action depriving the plaintiff in error of its property without due process.

II.

In matters of taxation the proceedings for assessment of property are necessarily summary in their nature, but where the tax is laid against the property according to value, there must be provision for such notice and hearing as are appropriate in such cases.

Hagar vs. Reclamation District, 111 U. S., 701, 710.

Weyerhauser vs. Minnesota, 176 U. S., 550.

This matter needs no elaboration. It will doubtless be conceded. Later on I shall attempt to show its precise applicability in the present case.

III.

It is essential to "due process" that notice and a hearing be demandable as a matter of right, not granted as a mere matter of favor or grace, and that the hearing be before an officer or board or tribunal having jurisdiction to hear and determine the matter and to give appropriate relief.

Roller vs. Holly, 176 U. S., 398, 409.

Security Trust Co. vs. Lexington, 203 U. S., 323, 333.

Londoner vs. Denver, 210 U. S., 373.

Stuart vs. Palmer, 74 N. Y., 183.

IV.

The action of the Colorado Tax Commission and the State Board of Equalization complained of here constituted a reassessment of all property affected thereby.

Gray on Limitations of Taxing Power, sec. 1295, p. 639.

Kuntz vs. Sumption, 117 Ind., 1.

Carney vs. People, 210 Ill., 434.

People vs. Insurance Co., 246 Ill., 442-448.

Overing vs. Foote, 65 N. Y., 263, 269, 277.

Douglass vs. Westchester Co., 172 N. Y., 309.

Tolman vs. Salomon, 191 Ill., 202, 204.

V.

Even if the power of reassessment or revaluation were vested in and could lawfully be exercised by either or both of those boards, the reassessment or raise in valuation could only be made upon notice and hearing or opportunity to be heard.

Gray, Limitations of Taxing Power, sec. 1295.

Bellingham Co. vs. New Whatcom, 172 U. S., 314.

Davidson vs. New Orleans, 96 U. S., 97, 135.

Gale vs. Statler, 47 Colo., 72.

State Revenue Agent vs. Tonella, 70 Miss., 701, 714, 715.

Kuntz vs. Sumption, 117 Ind., 1.

Barnard ex rel. vs. Wemple, 117 N. Y., 77.

Myers vs. Shields, 61 Fed Rep., 713.

VI.

There was no hearing; there was no notice; the rights of the property-owner were ignored, and the decision of the Supreme Court of the state sustaining the order of the boards was state action depriving the taxpayer of property without due process of law, in violation of the provisions of the Fourteenth Amendment.

Central of Georgia Ry. Co. vs. Wright, 207 U. S., 127.

The decision in the case cited, and the views expressed in the opinion, seem to me to apply with controlling force to the case under discussion.

VII.

Sections 31, 32, and 33 of the act creating the Tax Commission (Chapter 216, Session Laws of Colorado, 1911), under the provisions of which sections the State Board of Equalization and the Tax Commission acted, on their face and as construed by the Supreme Court of Colorado, plainly violate every requirement of "due process."

For convenience these sections are reprinted here. They are as follows:

> "Section 31. Duty of the Commission. The Commission shall, on or before the first day of October following, determine whether the real and personal property of the several counties in the State shall have been assessed at its true and full cash value, and if, in the opinion of said Commission the real or personal property within any County in the State as reported by said County Assessor to the said Commission is not on the assessment roll at its true and full cash value, the said Commission shall determine the increase or decrease in the valuation in such county by such rate per cent or such amount as will place said property on the assessment roll at its true and full cash value.

Section 32. Statement to the State Board of Equalization. When the Commission has determined the true value of the real and personal property in the several Counties, the Commission shall transmit to the State Board of Equalization a statement of the amount to be added to or deducted from the valuation of the real and personal property of each County, specifying the amount to be added to or to be deducted from the valuation of the real or personal property.

Section 33. Duty of the State Board of Equalization. It shall be the duty of the State Board of Equalization to examine the abstracts of assessment as submitted by the State Tax Commission and the State Board of Equalization shall forthwith examine the abstract of assessment of each County as submitted by the State Tax Commission and make a record of its action on the abstract of each County and certify the same to the County Assessor, and the County Assessor shall forthwith add to or deduct from each tract or lot, and its improvements, of real property and all personal property in his County the required per cent, or amount on the valuation thereof as it stands after it has been equalized by the State Board of Equalization, adding or deducting in each case any sum less than five dollars so that the value of any separate tract or lot and its improvements shall be ten dollars or some multiple thereof."

Admittedly the Tax Commission, in ordering and recommending the 40 per cent raise in valuation of all Denver property in 1913, did not act in accordance with subdivisions sixth and seventh of section 13 of the act of 1911. No claim has ever been made either that appraisers were appointed, as provided in subdivision sixth, or that there was a reappraisement according to the method there indicated. Nor is it claimed that action was taken under subdivision seventh, the provisions of which recognize the right of a property-owner to notice and hearing. It was therefore necessary to find other ground upon which to sustain the action of the Tax Commission and the State Board of Equalization, and sections 31, 32, and 33 of the act were put forward for that purpose.

This theory found sanction in the opinion rendered by the Supreme Court of the state, and the action of the Tax Commission and the State Board of Equalization seems to have been sustained by that court upon the ground that the action of the boards was taken pursuant to the provisions of the above-quoted sections of the act.

It is submitted that these sections are plainly violative of the "due process" clause of the Fourteenth Amendment. They contain no provision for notice or for hearing. By their provisions it is sought to authorize what in law and in fact must be regarded as a reassessment of all property in a given county based upon the opinion of the Tax Commission as to the "true and full cash value" thereof. These statutory provisions fix no time nor place of meeting or of hearing. Indeed, no hearing is contemplated. The whole matter of increasing or decreasing valuations is con-

fided to the Tax Commission, and that body is expressly empowered to base its action upon its *opinion.*

Not only are these sections upon their face obnoxious to the provisions of the Fourteenth Amendment, but the construction put upon them by the Supreme Court of the state makes certain their invalidity. The facts disclosed in this case serve to illustrate and emphasize the character of this legislation and its conflict with the fundamental requirements of notice and hearing. In support of this statement we desire briefly to review the situation from the point of view of plaintiff in error in substantially the language used in the argument filed in the Supreme Court of the state in support of the petition for rehearing in this case.

The Bi-Metallic Investment Company owned certain real property, located in the City and County of Denver, known as the Tabor Opera House Block. In 1913 the assessor placed upon this property, for purposes of taxation, a valuation of $802,000. There is perhaps a dispute as to whether the property was worth that much, but it is not disputed, and stands admitted by the pleadings, that this amount was the full cash value of the property. Anything added to that value was plainly and admittedly in excess of its actual value. However, that was the valuation placed upon the property by the assessor. The owner of the property remonstrated, but did not formally protest; did not appeal from the decision of the assessor, and was in no position to take advantage of its contention that the property was worth very much less than the valuation put upon it by the assessor. The property-owner could not by any possibility forsee that, under

the revenue system of the state, anything could by any method be added to that valuation by any official or board of officials—certainly not without notice and an opportunity to be heard. Thereupon the assessor completed his assessment roll, made the abstract thereof required to be made, and furnished a copy of that abstract of the assessment to the Colorado Tax Commission. That body gave no notice and held no hearing, but nevertheless determined that the property of The Bi-Metallic Investment Company, and of every other taxpayer in the City and County of Denver, had been valued too low; that in all instances and in every instance the valuation was too low by precisely 40 per cent. The only apparent basis for this conclusion was that it constituted the opinion of the Tax Commission. The method by which it was reached lacked every element of a judicial or quasi-judicial inquiry and every feature of a proceeding. It was wholly *ex parte*, and under the fundamental rules of law was a void and meaningless thing.

Thereupon this determination of the Tax Commission was communicated to the State Board of Equalization. That board never had any power of original assessment of the property of individuals. Never, from the time Colorado became a state, had it assumed to exercise such a power; never had it assumed the jurisdiction to hear, try, or determine any matter directly or indirectly dealing with the assessment or valuation of the property of individuals located wholly within a single county. The board never had existed for any such purpose. Its constitutional power was limited to the power to equalize valuations as between the counties by a certain method clearly

understood and definitely pointed out by the Supreme Court of the state (People ex rel. vs. Lothrop, 3 Colo., 428). There was nothing in the history of the state, nothing in the law of the state, and nothing in the action of the Board of Equalization in previous years, to cause any property-owner in the City and County of Denver even to suspect that his rights were to be called in question and to be passed upon by the State Board of Equalization at its sitting in October of the year 1913. No notice was given to property-owners that the State Board of Equalization was about to go beyond its powers and duties, as then understood and as theretofore defined by the highest court of the state, and to do things not before contemplated. Indeed, that board had at that time been stripped of all its statutory powers and had no longer the slightest semblance of legal right to do anything but equalize as between the counties of the state, in the manner already indicated, and within the limits defined and prescribed by the opinion in the Lothrop case. And so The Bi-Metallic Investment Company, and every other property-owner in the City and County of Denver, rested, and had a right to rest, secure in the belief that valuations of the property of individuals for purposes of assessment and taxation would not again be disturbed without some opportunity to be heard.

The time for the sitting of the County Board of Equalization had expired. The jurisdiction of that board to adjust and readjust and equalize values within the county—a constitutional prerogative—could no longer be exercised.

Under these conditions and at such a time either the Tax Commission or the Board of Equalization, or

both, accomplished the unprecedented result of increasing the valuation of the property of every taxpayer in the City and County of Denver to the extent of 40 per cent above the valuation placed thereon by the county assessor. And all this without hearing, without notice, without opportunity to be heard before any tribunal or at any stage of the proceeding. And then the Supreme Court of the state, by mandate, directed and commanded the assessor to extend upon his assessment rolls the increased valuation of all taxable property located within the City and County of Denver, holding in effect, if not in express terms, that the action of the State Tax Commission or the action of the State Board of Equalization, or both combined, was conclusive as against the world, and effectually precluding the taxpayer from anything resembling a day in court.

There was no pretense upon the part of the State Board of Equalization that its increase in the valuations of fifty-eight of the sixty-three counties in the state was done as an incident to equalization; no claim that such action was necessary in order to equalize values as between the various counties of the state. Indeed, the very communications from and resolutions by the State Board showed the very contrary, and showed beyond question and beyond doubt that the whole purpose of that board was to put upon the property in the various counties what that board or the Tax Commission declared constituted the full cash value of the property subject to taxation therein. This ultimate purpose was sought to be accomplished, and was accomplished, without even attempting to do it as an incident to equalization; and we submit that

the net result was fundamentally wrong; that it was accomplished without due process of law, in contravention of the specific provisions of the Fourteenth Amendment to the Federal Constitution.

We have seen that "due process of law," even in matters of taxation, requires that somewhere, somehow, and some time in the course of the proceedings the property-owner shall have some kind of notice and some opportunity to be heard. This is particularly true in cases of reassessment or revaluation, or addition of omitted property to the schedule of the taxpayer. This requirement is fundamental. The law with respect to it is elementary and has its foundation in the natural principles of justice.

To say that the statute which fixes the time of the sitting of the State Board of Equalization of itself gives notice to the individual taxpayer is not even plausible. It certainly does not meet the requirements of the law; and for this reason: no one was required to take notice that the State Board of Equalization was to sit to exercise any power other than the power conferred upon it by the Constitution, or by statute, or by both. As the law stood in October, 1913, the only thing which that board could deal with during its sessions was to equalize valuations as between the various counties of the state.

But suppose, for the sake of argument, and by way of illustration, that The Bi-Metallic Investment Company had seen fit voluntarily to appear before the State Board of Equalization in October, 1913, to protest and object to the 40 per cent increase in the valuation of its property. Could the board have heard

that objection? Would it have heard that objection? Could anyone have pointed out any provision of statute or of Constitution which conferred upon that board any power or any jurisdiction to hear that objection, or evidence in support of it, or to take action upon it? Would not that board have said, and said rightly: "We cannot hear you. No such power has been conferred upon us. We have neither the time, nor the inclination, nor the machinery, nor the authority, to deal with or determine the questions which you present"? The intimation of the majority opinion of the Supreme Court of Colorado, that the statute fixing the time during which the State Board of Equalization shall sit gives notice to all property-owners, concedes the correctness of the contention that there must be notice. But there must be more than notice. There must be an opportunity to be heard before and by a tribunal with power and jurisdiction to act. Otherwise the constitutional requirement of due process of law is not complied with. This seems to be the precise point covered by the decision of this court in the case of Londoner vs. Denver, 210 U. S., 386. It is true that was a case of a special assessment for local improvements, but the principle is the same. It is therefore most earnestly submitted that the holding of the Colorado court permitted the state to confiscate the property of The Bi-Metallic Investment Company to the extent of the tax levied and assessed upon the increase of valuation of its property. This is a blunt, plain statement; but it is submitted that it is absolutely correct, because it has nowhere been questioned that every dollar of the 40 per cent which was added to the valuation of the

assessor was in excess of the full, fair, true cash value of the property. It was precisely as if the plaintiff had been taxed upon property which it did not possess.

The fact that this enormous raise in valuation was made by wholesale; that it was not confined in operation to the property of specified individual taxpayers; that it affected every taxpayer of the City and County of Denver, from the man with $1,000 of money in bank who was compelled to pay taxes upon $1,400, to the largest property-holder of the city; does not change its inherent nature nor relieve it of its essential illegality for want of due process. It but added to the magnitude of the wrong done.

This court has often held that it is not what is done, but what may be done under the provisions of a state statute or the decision of a state court, that determines whether the guaranty of the Fourteenth Amendment has been ignored by the state. Here complaint is not only of what was done, but of what may be done; for it is apparent that the method pursued by the Tax Commission and the Board of Equalization of Colorado in 1913, and sustained by the Supreme Court of that state, may as well apply to an increase of 400 per cent in the valuation of property for taxation as to an increase of 40 per cent. There is no apparent limit, except the opinion or the determination of the boards themselves.

VIII.

By their Constitution, the people of Colorado, recognizing the necessity for limitation of the taxing

power, provided that the rate of the tax levy for state purposes should never exceed 4 mills on each dollar of valuation. This provision, written into the fundamental law of the state, is rendered useless and meaningless if a tax commission or a board of equalization, or both, can put upon the taxable property of the state any valuation which uncontrolled opinion may fix or determine. Of course, mere violation, direct or indirect, of a provision of the state Constitution will not be inquired into by the court. Yet it seems to me not improper to say that, if there is such a violation of an important provision of the state Constitution in a case where, as in this, the taxing system and laws of the state, as applied by its officials and construed by its highest court, are in conflict with specific provisions of the Constitution of the United States, then the injured taxpayer is doubly justified in urging his cause in the face of all considerations of public convenience or inconvenience.

Plaintiff in error here attacks what is believed to be an unwarranted and a dangerous assumption of power by the state boards. Wisdom dictates that the time to make such an attack is when the power is first asserted. Plaintiff in error has acted upon that principle.

I submit that the judgment of the Supreme Court of Colorado should be reversed.

Respectfully submitted,

HORACE PHELPS,

Attorney for The Bi-Metallic Investment Company,
Plaintiff in Error.

INDEX.

	PAGE
Statement relative to parties	1, 2
Statement relative to cross-bill and pleadings	2, 3
Statement relative to mandamus proceeding in People ex rel. vs. State Board of Equalization, etc.	3
Statement of determination of the suit in case of People ex rel. vs. State Board of Equalization, etc.	4
Plain Story of Controversy	4
Action of Assessor and Colorado Tax Commission	4, 5
Lack of Notice	5
Law and Argument	5
Increased Taxation	12
Conclusion	26

UNITED STATES SUPREME COURT CASES CITED.

Security Trust & Safety Co. vs. Lexington	15
Central Ga. R. R. vs. Wright	15
Londoner vs. City and County of Denver	16
Taylor vs. Louisville & N. R. Co	17
Hovey vs. Eliot	17
Chicago, etc., R. R. Co. vs. Chicago	18
Glidden vs. Harrington	18
Turpin vs. Lemon	18
Hagar vs. Reclamation Dist	19, 21
Railroad Tax Cases	19
Winona Case	20
Weyerhauser Case	20
Gallup Case	21
Coe vs. Armour F. Works	22
St. Louis S. W. Ry. vs. Ark	22
State Railroad Cases	22
Kentucky Railroad Tax Cases	22

PAGE

COLORADO CASES CITED.

People ex rel. vs. Pitcher..... 5, 26
People ex rel. vs. Ames..... 7
People ex rel. vs. Lothrop.....11, 12
Gale vs. Statler..... 13
Brown vs. City of Denver..... 14
People ex rel. vs. Board of Equalization..... 15

CONSTITUTION AND STATUTES REFERRED TO.

Sec. 15, Art. X Colorado Constitution..... 6
Session Laws of 1913.....6, 24, 26
Session Laws of 1911..... 10

(24,139)

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1915.

No. 116.

THE BI-METALLIC INVESTMENT COMPANY,
PLAINTIFF IN ERROR,

VS.

THE STATE BOARD OF EQUALIZATION, THE COLORADO TAX COMMISSION, ET AL.,
DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF OF DEFENDANT IN ERROR, CLAIR J. PITCHER, COMMISSIONER OF FINANCE, EX-OFFICIO ASSESSOR OF CITY AND COUNTY OF DENVER.

STATEMENT OF CASE.

The statement of facts in this case in the brief of plaintiff in error is substantially correct, and to avoid repetition will be adopted as a part of this

brief. The defendants in error in this suit were defendants in both the trial court and the Supreme Court of the State of Colorado.

This defendant in error was also made defendant in a cross bill filed by the other defendants in this case. The defendants in error are all public officials, the other defendants in error being members of the State Board of Equalization and the Colorado Tax Commission, while this defendant in error is Commissioner of Finance and ex-officio assessor of the City and County of Denver, and as such performs both city and county duties. He performs constitutional, statutory and charter duties. The State Board of Equalization is a constitutional body, having its duties largely defined by the Constitution of the state. The Colorado Tax Commission is purely a creature of the legislature, having its duties entirely defined thereby.

In the cross bill filed against this defendant in error by the state officials, the other defendants in error, it was charged that the sympathy of this defendant in error was with the contention of the plaintiff in error, and this was admitted in the answer to the cross bill filed by this defendant in error. The cross bill filed by the other defendants in error was dismissed by the trial court. It was alleged among other things by the answer of this defendant in error to the cross bill that the action of the defendants in error, the Colorado Tax Commission and the State Board of Equalization, was and is an attempt to deprive the owners and taxpayers of the City and County of Denver of their property without due process of law and in violation of the provisions

of the fourteenth amendment to the constitution of the United States, and in violation of the provisions of section 25, of article two of the constitution of the State of Colorado.

As this defendant in error is a party to the action, and as the controversy is of such general interest to all of the taxpayers of the City and County of Denver, and as the controversy has continued to occur each year since this suit was tried, it is considered proper that the position of this defendant in error should be stated to this court.

At the same time this suit was pending in the state courts, another suit, which was an original mandamus action, was begun in the Supreme Court of the state, which was entitled People of the State of Colorado, *ex rel.* State Board of Equalization and the Colorado Tax Commission vs. Clair J. Pitcher, Commissioner of Finance, ex-officio assessor of the City and County of Denver (56 Colo. p. 343), which was brought for the purpose of compelling this defendant in error to extend on the tax rolls the assessment on the property in the City and County of Denver as fixed by this defendant in error and as increased 40% by the Colorado Tax Commission and the State Board of Equalization of the State of Colorado.

The latter action was contested by this defendant in error and among other questions the question here involved of "due process of law" under the fourteenth amendment to the constitution of the United States was considered in that suit; but judgment went against the defendant in

error by a majority of the Supreme Court of the State, the justices having been divided, four to three on the decision.

This case was determined by the decision in the case of the people of the State of Colorado, ex rel. State Board of Equalization and the Colorado Tax Commission vs. Pitcher, *supra,* and this court in considering this case will no doubt consider at length the decision in the case last mentioned (see 56, Colo., 343).

The plain story of this controversy is that the defendant in error, Clair J. Pitcher, as assessor of the City and County of Denver, made his assesment of the values of all assessable property, after personal inspection and investigation, at what he deemed its full cash value, and made oath thereto. He followed strictly all of the provisions of the law relative thereto. If any taxpayer was aggrieved at the valuations placed by him, the statutes afforded such taxpayer times and places where he could file his objections and be heard. The taxpayer could have first made objections and had a hearing of his objections before the assessor; thereafter he might have exercised similar rights before the County Board of Equalization, and if dissatisfied with the decision of the County Board of Equalization he had his appeal therefrom to the District Court of the second judicial district of the State of Colorado, and was thereby afforded "due process of law."

After completing the abstract of assessment the same was forwarded to the Colorado Tax Commission. The Colorado Tax Commission assumed to possess authority to raise the valuations of all as-

sessable property in the City and County of Denver in the aggregate, and by horizontal increase of 40%, amounting to $101,902,088.

The Colorado Tax Commission directed the assessor to make this increase of valuations. This the assessor declined to do. Thereafter the Colorado Tax Commission forwarded a report of its action thus increasing the assessable valuations to the State Board of Equalization, which Board adopted the increase so fixed by the Colorado Tax Commission. Still the assessor refused to act, and subsequently the *original* proceeding hereinbefore referred to was instituted in the Supreme Court of the state and resulted in the issue of the mandate of that Court to the assessor to make the increase to the extent of the amount above mentioned (56, Colo., 343).

No taxpayer was advised of the 40% increase in any way; no notice of any kind from any source of this increase was given, or is or was provided for under the constitution or laws of the State of Colorado; no opportunity to protest, no hearing was afforded any taxpayer.

LAW AND ARGUMENT.

The real and only question for consideration is whether the constitutional guarantee of due process of law was afforded to the plaintiff in error.

The Supreme Court of Colorado claims in its opinion in the case of *People of the State of Colo. vs. Pitcher,* 56 Colo., page 368, that actual notice to the individual taxpayer is not required as a condition

precedent to the action taken by the State Board of Equalization, notwithstanding such boards may exercise the power of increasing or decreasing the aggregate valuation as returned from the respective counties. It further declares that the rule is equally well settled that the only notice necessary in such cases is the law fixing the time and place of the holding of the meetings of such boards.

The constitution of the State of Colorado, Section 15, Article X, declares the duties of the State Board of Equalization shall be to adjust and equalize the valuations of real and personal property *among* the several counties of the State; and that the duty of the County Board shall be to adjust and equalize the valuation of real and personal property *within* their respective counties.

The State Board of Equalization prior to 1913 was empowered to assess public utility corporations, including railway companies, telegraph, telephone, palace car, sleeping car, fast freight and express companies, and were required to meet on the first Monday of April in each year for such purpose. It was further provided by statute that any of these corporations feeling aggrieved at the assessment made by the State Board of Equalization were entitled to file on or before the 25th day of August a petition setting forth the illegalities, errors, erroneous assessments, or discriminations, and a hearing was accorded to be held on the second Monday of September and succeeding days if necessary.

This applied solely to the assessment of these corporations which the State Board of Equalization had the exclusive right of assessing.

But by constitution, or statute, as we view it, no provision is made for a protest or hearing on the part of any individual taxpayer whose property values may be increased, after the statutory period of the meeting of the County Board of Equalization has expired.

Prior to the decision in this case, the Supreme Court of Colorado in the case of *People vs. Ames*, 27 Colo., 126, at page 129, said:

> "The Constitution provides that the taxes are to be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and are to be levied under a plan which shall secure a just valuation for the purposes of taxation. One authority levies a tax for county purposes, the other for the maintenance of the state. To secure a uniformity in taxation, there must be a uniformity in valuation of the subjects upon which the tax is levied. To attain this end, boards of equalization have been provided, one object of which is to equalize assessments as to bring the different assessments of the several parts of a taxing district to the same relative standard, so that no one part will be compelled to pay a disproportionate share of a tax."

At page 130 of the same opinion, the Court further speaking of the County Board of Equalization and the State Board of Equalization, said:

"Each is a constitutional body, with powers defined and limited by the fundamental law of the state, the respective authority of which is essentially different. The former shall equalize and adjust the property values among the several counties of the state; the latter shall equalize and adjust such values within the respective counties. * * *

"That values should be equitably adjusted among the several counties of the state was necessary because without a power lodged somewhere to effect this result, great inequality might prevail in the valuation of the different counties, and the burden of supporting the state government would be inequitably distributed. For a like reason is was necessary that property values should be adjusted and equalized within the respective counties, so that the taxes for county purposes would be uniform. The State Board has no authority to revise the work of the County Board; therefore, it has no power to equalize valuations between classes or kinds of property in the respective counties, for that is a matter which the constitution confines to the County Board. In order, then, that the two boards may work harmoniously, the action of one not interfere with the other, and the authority of each, within its own proper sphere be supreme, it must necessarilly follow that the State Board, in

> equalizing and adjusting values, must deal with the respective valuations as returned by the county assessors as entireties, by making such changes in each county valuation as a whole, as will relatively equalize the entire property values of the different counties, so that the burden of supporting the state government shall rest proportionately upon each. In the case at bar the State Board has not adjusted or equalized property valuations in the manner which the law contemplates, but in selecting different classes and kinds of property, and raising or lowering their values, has usurped the functions of the County Board, and attempted to revise its action in this respect."

On rehearing in the last mentioned case the Supreme Court of Colorado said:

> "The question with which the State Board deals is not whether certain kinds and classes of property in a given county have been assessed too high or too low, but whether the aggregate valuation of the property in that county as compared with the aggregate valuation of property in other counties is too high or too low; it has nothing to do with equalizing valuations between individuals, or between different kinds or classes of property in any county. That is a matter left with the County Board * * * Whether property is

assessed too high or too low, that is a matter for which the County Board is alone responsible."

By section 40 of the act of 1911, (Session Laws 1911, page 625) it is provided:

> "All powers of original assessment of public utility corporations with other statutory powers, duties and privileges now exercised by the State Board of Equalization are hereby conferred upon the Colorado Tax Commission."

It will thus be seen that the only power left in the State Board of Equalization at the time of the action herein complained of was simply:

> "To adjust and equalize the valuation of real and personal property *among* the several counties of the state."

And because a specified time was mentioned when the State Board of Equalization would meet for the purpose of adjusting and equalizing these values *between* the several counties, the Supreme Court of Colorado assume that this affords the individual taxpayer an opportunity to appear and protest against the increase in value of his assessable property.

All that the State Board of Equalization did was to adopt increases fixed by the Colorado Tax Commission, and advise the assessors of such increase. It then became the duty of the assessor according to the theory of the Tax Commission and the State Board of Equalization, to increase all values in the City and County of Denver to the extent of 40%.

The assessor was not required to notify any taxpayer of these increases. He was not required to afford a hearing, nor could he have afforded a hearing to any taxpayer. There was but one thing for the assessor to do, and that was to make the increase on all kinds and character of property to the extent of 40%.

In the case of *People ex rel. vs. Lothrop,* 3 Colo., 428, at page 466, the Supreme Court of Colorado said:

> "Looking then to the provisions of the constitution and the statute, we are clearly of the opinion that the power to fix and determine the valuation of taxable property is lodged by them in the assessor and the Board of County Commissioners of the several counties of the state, and that when they have under the law performed this duty and exercised this power, that the sum of the valuations of the several counties so by them found must be taken as the *aggregate* valuation of all the property in the state, and is conclusive and final as against the State Board of Equalization."

> The State Board may, for the purpose of adjusting and equalizing, increase the aggregate valuation of one county, and decrease the aggregate valuation of another, but they have no power to increase the sum of all the valuations of the several counties of the state. That aggregate valuation has been found for them, and fixed by the au-

thority and in the mode prescribed by the law. * * *

The aggregate material with which the Board can deal is thus limited; they may adjust and equalize it among the several counties, but they cannot add to its volume."

At page 467 of the same opinion the court said:

"If this claim of power on behalf of the State Board to increase the valuation be admitted, why limit in the constitution the per cent that it may levy? It matters little if the limitation be one mill or ten, if increase of valuation be unrestrained. Limited upon the one hand, it is unlimited upon the other. We may neither recalculate its extent nor challenge its pretensions. Over $5,000,000 increase this year—it may be over 50,000,000 increase the next."

In the case under consideration the aggregate value of all assessable property in the state was increased by $186,551,658, in fifty-eight counties (but not in all) and in Denver alone made an increase of $101,902,088 without any decrease in the remaining counties.

It is our opinion that the doctrine announced in the Pitcher case overrules the principles enunciated in the Lothrop case, although such overruling is expressly disclaimed in the majority opinion.

Under the ruling of the Colorado Supreme Court it is quite manifest that if a taxpayer returns $5000 in cash as being his assessable property

owned by him and liable to taxation, under the conditions as they appear in this case this $5000 is increased to the extent of 40%, without notice and without opportunity to make protest. Thus the individual is taxed for property in excess of what he actually owns regardless of its cash value.

In the case of *Gale vs. Statler,* 47 Colo. 74, the Supreme Court of Colorado said:

> "It is true that no mere irregularity or omission in the assessment of property or the levy of a tax affects the legality of the tax levy; but an omission to conform to such substantial provisions of the statute as require notice to be given the taxpayer, if a material addition has been made to his schedule, so that he may have the opportunity to be heard before the assessor, and if the decision of that officer is against him, before the District or County Court, does invalidate a tax, which has been levied in violation of such requirement, and the taxpayer before the tax sale, may have relief. Notice of some kind in a case of this sort is essential, and the failure to give it deprives the taxpayer of a substantial right which the statute has conferred. As already said, the defendant cannot hide behind the claim, which is nothing but a subterfuge, that in this case the notice could not be given at the time fixed by statute, because the change was not made until after that time had passed. That would entirely defeat the very object of the law, which is

> to furnish the taxpayer with notice. Neither can they be heard to say that the taxpayer was not deprived of a substantial statutory right, compliance with which is a condition precedent to the validity of the tax levy, upon property added by the assessor to his schedule."

The Supreme Court of Colorado in the case of *Brown vs. City of Denver,* 7 Colo. 305, at page 311, in referring to the provisions of section 1, Article XIV, of the Constitution of the United States, and section 25, of Article II, of the Constitution of the State of Colorado, said:

> "The doctrine of the authorities is, that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise; at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise, the constitutional guaranties above cited are infringed."

It certainly can make no difference which of the authorities exercising assessing or taxing powers, violates the constitutional or statutory rights of a taxpayer, whether it is the assessor, the Tax Commission or the State Board of Equalization. The law is just as potent in one case as in the other, and it must be complied with.

We do not think that this court can safely go to the extent that the Supreme Court of Colorado has done, by saying that a taxpayer may have the values of his property raised 40, 50 or 100 per cent, because the time has passed for him to raise his objections.

The Supreme Court of Colorado in case of *People vs. Board of Equalization,* 20 Colo. 220, has declared that in connection with the levy and collection of revenue "it is the duty of every officer to refrain from doing any act which falls within the inhibition of the State Constitution."

In the case of *Security Trust & Safety Co. vs. Lexington,* 203 U. S. 323, this Court said that before an assessment of taxes could be made upon omitted property, notice to the taxpayers with an opportunity to be heard, was essential, and that somewhere during the process of assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.

And in *Central Georgia R. R. Co. vs. Wright,* 207 U. S. 138, this Court concludes its opinion as follows:

"Reluctant as we are to interfere with the enforcement of the tax laws of a state, we are constrained to the conclusion that this system does not afford that due process of law, which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impeachment by state action."

In the case of *Londoner vs. City and County of Denver*, 210 U. S. 373, it was held that the denial of due process of law by municipal authorities, while acting as a board of equalization, amounts to a denial by the state, and in that case the following language appears:

"There are few constitutional restrictions on the power of the states to assess, apportion and collect taxes, and in the enforcement of such restrictions this Court has regarded substance and not form. But where the legislature commits the determination of the tax to a subordinate body, due process of law requires that the taxpayer be afforded a hearing, of which he must have notice, and this requirement is not satisfied by the mere right to file objections, and where, as in Colorado, the taxpayer has no right to object to an assessment in court, due process of law, as guaranteed by the Fourteenth Amendment, requires that he have an opportunity to support his objections by argument and proof at some time and place."

Judge Taft, in the case of *Taylor vs. Louisville & N. R. Co.*, 88 Fed., 350, says:

> "The power to tax property is the power to take from the owner that which is his, to defray the expense of the benefit and protection which he receives from the government. If the power is illegally exercised, either by the legislature or the executive, it is an invasion of private right."

In *Carney vs. People*, 210 Ill. 434, it is said:

> "Neither an assessor nor a board of review can change a total value of property against an individual without assessing the property."

We insist that when the Fourteenth Amendment provided that no person shall be deprived of his property without a hearing, it also declared that he should not be deprived of a hearing as a penalty.

Whatever the crime, however great the contempt, however contumnacious a party, he cannot be deprived of the right to be heard when his property is to be taken. Judgment of any sort must be after notice, and if a criminal wrong-doer cannot be punished without a hearing, by so much the greater reason cannot an honest and mistaken citizen be declared a defaulter, and deprived of the right to be heard as a penalty. It is contrary to the first principles of the social compact to deprive one of the right to be heard.

Hovey vs. Elliott, 167 U. S. 414.

To deprive one of property, without an opportunity to be heard, would be regarded as "a sentence, an act of spoliation."

Chicago, etc. R. R. vs. Chicago, 160 U. S. 235.

In *Galpin vs. Paige*, 18 Watt. 350, this Court declared:

> "It is a rule as old as the law, and never to be more respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

And—

> "Where the proceedings are arbitrary, oppressive or unjust, they are declared not to be 'due process of law.' "
>
> Glidden vs. Harrington, 189 U. S. 258.
>
> Under the Fourteenth Amendment, the legislature is bound to provide a method for the assessment and collection of taxes that shall be
> "in conformity with natural justice."
>
> Turpin vs. Lemon, 187 U. S. 51.

The Supreme Court of Colorado, in the Pitcher case, 56 Colo. at 368, quoted from *Turpin vs. Lemon*,

supra, but omitted to give the definition of due process therein contained, taken from the case of *Hagar vs. Reclamation District,* 111 U. S. 701.

> "Nothing is more clearly established by weight of authority, absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceedings."
>
> Justice Field in Railroad Tax Case, 13 Fed. 752.

If the charge is for taxes for the current year, there must be notice. If the charge is for re-assessment, there must also be notice, and a right to be heard on the re-assessment.

> "Wherever a re-assessment of any kind is made, notice of that re-assessment is essential."
>
> Bellingham Co. vs. New Wheaton, 172 U. S. 318.
>
> Kuntz vs. Sumption, 117 Ind. 1.
>
> Walsh vs. State, 142 Ind. 557.

> "The law has carefully protected the owner of property, after giving in his list of taxable property which has been accepted without objection by the assessor, from any change except on notice to the owner."
>
> Lehman vs. Robinson, 69 Ala.
>
> Cleghorn vs. Postlewait, 43 Ill. 431.
>
> Tolman vs. Solomon, 191 Ill. 204.

> "When the defendants in this case delivered their list to the assessor without ob-

> jection from him, they had the right to presume, and the law justified them in that presumption, that their valuation of the property was accepted, and would remain as delivered; and even if the assessor has authority to raise the assessment, he could not do this without notice to the party to be affected thereby. After the assessment is made, it does not lie in the power of the assessors to raise the original assessment on personal property without notice to the taxpayer. * * *
>
> "Whether judicial or not, it is immaterial to inquire, because if the act contested here does indeed assume the proportions of a judgment, it is a judgment without notice, and consequently void."
>
> State vs. Spencer, 21 S. W. 837.

The constitutional guarantee of due process can not be circumvented by giving notice in the first instance, and then changing the assessment by adding property without notice. In *Phillips vs. Township of New Buffalo*, 31 N. W. 582, the Court said:

> "The right to be heard on the valuation would be nugatory if the board after giving a party the redress he is entitled to, and leaving him satisfied with their conclusion, then turn around and undo their judgment."

This Court has recognized the necessity for notice and opportunity to be heard in the assessment of back taxes. In the *Winona case*, 159 U. S.

52; in the *Weyerhauser case,* 176 U. S. 550; and in the *Gallup case,* 183 U. S. 205. In all the foregoing cases, this Court recognized in the strongest way the necessity for allowing the taxpayer to be heard when he is taxed on omitted property.

In *Hagar vs Reclamation District,* 111 U. S. 701, 708, Justice Field defines "due process of law" in the following words:

> "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgement sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

And further in the same opinion it is said:

> "Under the Fourteenth Amendment the Legislature is bound to provide a method for the assessment and collection of taxes which shall not be inconsistent with natural justice."

Nor can an unofficial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires.

Coe vs. Armour F. Works, 237 U. S. 413, 424.

> "Upon the mere question of construction we are of course concluded by the decision of the State Court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by a state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

St. Louis S. W. Ry. vs. Arkansas, 235 U. S. 350, 362.

The Supreme Court of Colorado in our opinion largely predicates its conclusions upon the doctrine as announced in the State Railroad Tax Cases, 92 U. S. 575, and the Kentucky Railroad Tax Cases, 115 U. S. 321.

In this connection we desire to call attention to the fact that under the provisions of the Act of 1911 creating the Tax Commission, the Commission has nothing to do with adjusting and equalizing valuations of real and personal property among

the several counties of the state. What they could do as a central body, if they find that the propery of a county had not been assessed at its true and full cash value, would be to make a re-appraisement of the property in the manner and method provided by subdivision 6 of Section 13 of the Act. It is pretended that the Tax Commission acted under Sections 31, 32 and 33 of the Act of 1911, but nowhere in those sections is there any provision for notice to any taxpayer or for any hearing.

Section 15 provides that the Commission *may* receive complaints, and carefully examine into all cases where it is alleged that property subject to taxation has not been assessed, or has been fraudulently or for any reason improperly or unfairly assessed, or the law in any manner evaded or violated, and may cause to be instituted such proceedings as will remedy improper or negligent administration of the taxation laws of the state. The provisions of this section have no application to a case where the raise has been horizontally made. But applies to assessments by local assessors or a re-appraisement made by the Tax Commission under subdivision 6 of Section 13 of the Act. See comment of Mr. Justice Hill, dissenting, at p. 93 of Record.

This does not constitute due process of law. In addition it simply says that complaints may be received, but on or before the first day of October the Commission must forward its action to the State Board of Equalization, and then and there the powers of the Tax Commission are ended. They have no means or method of remedying their actions, nor does the act provide for an opportunity to file complaints or for a hearing.

The Act of 1913, (Session Laws of 1913 page 527) by section 5 thereof absolutely deprives the County Board of Equalization, to-wit, the Commissioners of the City and County of Denver, from rebating or refunding any taxes without the consent of the Tax Commission; and section 8 of the last mentioned act provides for a hearing where property has been assessed by the Tax Commission, and that of course means only the public utilities so assessed, as the Tax Commission has no original power of assessment except that given by Section 40 of the Act of 1911.

The action of the taxing authorities is well expressed and set forth in the dissenting opinion of Justice Gabbert, 56 Colo. 385, wherein he says that the State Board of Equalization did not regard the action of the Commission as an assessment. From its resolution, which is the basis of this action, it appears not that it equalized valuations returned by the assessors, or the Commission, or both; but

> "has determined the amount of the valuation of the real and personal property of each county as will place said property on the assessment roll at its true and full cash value,"

thus showing that its action was in no sense an equalization of valuations, but that it fixed the valuations in each of the counties affected in such sum as would place the property therein on the assessment roll at its full cash value.

Thus it will be seen that the action of the State Board was not an attempt at equalization, but merely the adoption of the increases fixed by the

Tax Commission, and hence we can say that this cause does not come under the rules laid down in the State Railroad Tax Cases and other cases relied upon by the Supreme Court of Colorado.

The resolution of the State Board of Equalization will be found in the case of *Colorado Tax Commission vs. Pitcher,* 56 Colo., beginning at page 399, and in the language of Justice Hill in his dissenting opinion, we say that if a proper construction of the resolution is that the State Board of Equalization made these increases for the purpose as therein stated, of placing the property on the assessment roll at its full cash value as determined by the Board, then there is neither constitutional nor statutory authority for its so doing; and that the contention that these increases were ordered as an incident to equalization is unutenable when the record and its effect are taken into consideration.

And further quoting from Justice Hill's opinion, with which we have always been in accord,

> "another reason why the action of the State Board of Equalization should not be accepted as an effort at equalization between the different counties, is because its order raising valuations pertains only to that portion of the property which has been assessed by the county assessors, but does not apply to the property assessed by the Tax Commission."

Justice Hill announces repeatedly in his dissenting opinion that due process has been denied the taxpayers and says this view is concurred in by two of the other justices.

CONCLUSION.

The dissenting opinions in *Colorado Tax Commission vs. Pitcher,* 56 Colo., at page 384, and particularly the dissenting opinion of Mr. Justice Hill, are very persuasive, the reasoning appears to us to be sound and the conclusions irresistible; and we especially commend these dissenting opinions to the consideration of this Court. We recognize that the only part of the majority and dissenting opinions with which this Court is concerned, is the part having reference to "due process of law" under the Constitution of the United States.

As we said at the outset, when an assessment has been made by the local assessor ample opportunities are afforded to the taxpayer who may be aggrieved for the filing and hearing of objections, and when the Colorado Tax Commission is proceeding under subdivision 6 of section 13 of the act of 1911, in making a re-appraisement (Session Laws Colorado, page 616), the same statute provides, under subdivision 7 of section 13, for notice to the taxpayer and an opportunity to be heard. But when the Tax Commission is proceeding under section 31 of the act of 1911, where no re-appraisement has been made, but a horizontal increase at a certain rate per cent, no notice whatever is provided for, and the increase of such rate per cent, in this case being 40%, is made without notice to the taxpayer and without any opportunity for him to appear before any tribunal to file objections or to be heard thereon. The taxpayer not only does not receive notice of the raise of such a rate per cent, but the law contains no provision for the aggrieved taxpayer ap-

pearing at any time or place where relief can be sought. This, it seems (especially in a case where the raise has been so substantial as in the one under consideration), must within the expressions of this Court be contrary to "natural justice" and be depriving the taxpayer of his property without any process of law.

In this case only one taxpayer is involved, but the raise of the rate per cent having been universal over the City and County of Denver, and having operated as such a hardship on the taxpayers of the City and County of Denver, this defendant in error as a public official, being a party defendant, has felt it his duty to give the Court the benefit of his views and this discussion of the law.

Respectfully submitted,

JAMES A. MARSH,
GEORGE Q. RICHMOND,

Attorneys for Defendant in Error, Clair J. Pitcher, Commissioner of Finance, ex-Officio Assessor of City and County of Denver.

Subject Index

	Page
Statement of the Case	1
Brief of the Argument:	
Subdivision I,	10
Subdivision II, Adequate Remedy at Law	15
Subdivision III, Due Process of Law	25
Subdivision IV, Conclusion	36

Constitutional and Statutory Provisions Referred To

	Page
Constitution of United States, XIV Amendment	4
Colorado Constitution, Art. X, sec. 2	4
Colorado Constitution, Art. X, sec. 3	4
Colorado Constitution, Art. X, sec. 11	4
Colorado Constitution, Art. X, sec. 15	5
Colorado Constitution, Art. XI, secs. 3, 5, 6, 8	5
Colorado Constitution, Art. II, sec. 25	4
Revised Statutes of Colorado, 1908, sec. 5529	5
Revised Statutes of Colorado, 1908, sec. 5614	5
Revised Statutes of Colorado, 1908, sec. 5639	5
Revised Statutes of Colorado, 1908, sec. 5640	6
Revised Statutes of Colorado, 1908, sec. 5641	6
Revised Statutes of Colorado, 1908, sec. 5658	6
Revised Statutes of Colorado, 1908, sec. 5761	6
Revised Statutes of Colorado, 1908, sec. 5764	7
Revised Statutes of Colorado, 1908, sec. 5767	7
Revised Statutes of Colorado, 1908, sec. 5750	16
Session Laws of Colorado, 1911, Ch. 216, sec. 9	7
Session Laws of Colorado, 1911, Ch. 216, sec. 13	7
Session Laws of Colorado, 1911, Ch. 216, sec. 15	7
Session Laws of Colorado, 1911, Ch. 216, sec. 30	8
Session Laws of Colorado, 1911, Ch. 216, sec. 31	8
Session Laws of Colorado, 1911, Ch. 216, sec. 32	8
Session Laws of Colorado, 1911, Ch. 216, sec. 33	9
Session Laws of Colorado, 1911, Ch. 216, sec. 36	7
Session Laws of Colorado, 1913, sec. 1, page 525	9
Session Laws of Colorado, 1913, sec. 3, page 535	10
Session Laws of Colorado, 1913, Chapter 137	10

Cases and Authorities Cited and Referred To

	Page
Bellingham etc. Co. vs. New Whatcom, 172 U. S., 320	11
Bent County vs. A., T. & S. F. Ry. Co., 52 Colo., 609	16
Carrico, et al. vs. Crocker, et al., 133 Pac. (Okla.), 183	32
Cook County vs. Canal Co., 138 U. S., 635, 651	24
Cooley, Constitutional Limitations (6th ed.), Ch. 7	11
Cooley on Taxation, page 760	16
Cooley on Taxation (3rd ed.), pages 53-55	27
Eustis vs. Bolles, 150 U. S., 361	24
Hagar vs. Reclamation Dist., 111 U. S., 701	28
Hallett vs. Arapahoe County, 40 Colo., 303	16
Ins. Co. vs. Bonner, 7 Colo. App., 97	16
Johnson vs. Risk, 137 U. S., 300	25
Kelly vs. Pittsburgh, 104 U. S., 79	29
Klinger vs. Missouri, 13 Wallace, 257	25
McGehee on Due Process of Law, page 232	26
McMillan vs. Anderson, 95 U. S., 41	28
Newman vs. People, 23 Colo., 306	11
Pittsburgh etc. Ry. Co. vs. Backus, 154 U. S., 425	30
Singer S. M. Co. vs. Benedict, 229 U. S., 481	16
State R. R. Tax Cases, 92 U. S., 575, 613	20, 30
State vs. Armstrong, 56 Pac. (Utah), 1076, 1079	28
State vs. Louisiana, 8 Otto, 140	24
Suydam vs. Merrick Co., 19 Nebr., 155	31
Tax Commission vs. Pitcher, 56 Colo., 376	14, 35
Territory vs. Bank, 65 Pac. (N. M.), 172	28
Turpin vs. Lemon, 187 U. S., 51	25
U. P. R. R. Co. vs. County Commrs. Weld County, 133 C. C. A., 392	23
Walter A. Wood Co. vs. Skinner, 139 U. S., 293	24

(No. 24,139)

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1915.

No. 116.

THE BI-METALLIC INVESTMENT COMPANY,
PLAINTIFF IN ERROR.

VS.

THE STATE BOARD OF EQUALIZATION, THE COLORADO TAX COMMISSION, ET AL., DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The statement made by the plaintiff in error is probably sufficient to give the court an understanding of the points raised by plaintiff in error in its assignments of error. However, for convenience, we will briefly outline the issues herein as we understand them.

This case was instituted in the District Court of the City and County of Denver, State of Colorado, by the above plaintiff in error, by its filing a complaint, asking for an injunction against the assessor of the City and County of Denver, the State Board of Equalization of the State of Colorado, and the Colorado Tax Commission, to restrain them from adding an increase of forty per cent in the valuation of plaintiff in error's property. The increase of forty per cent was made by the Colorado Tax Commission and the State Board of Equalization on all the property, both real and personal, situated within the City and County of Denver. It was contended by the plaintiff below, plaintiff in error here, that the Colorado Tax Commission and the State Board of Equalization were without power to make this horizontal raise; that it resulted in increasing the aggregate valuation of all of the property of the state, and that, no notice having been given to the individual taxpayers of such raise, and no opportunity having been afforded said taxpayers for a hearing, therefore the action of these two boards was in contravention of the Constitution of the United States and the Constitution of the State of Colorado, guaranteeing due process of law. The defendants, the State Board of Equalization and the Colorado Tax Commission, answered the complaint by setting forth in detail the constituent acts that had been performed by the various taxing officers of the county and state, to which answer the plaintiff below demurred. Judgment was rendered in the court below in favor of the plaintiff, from which judgment the defendants sued out a writ of error in the Supreme Court of the state.

When the case reached the Supreme Court there was pending there an original application for a writ of mandamus, brought by the State Board of Equalization and the Colorado Tax Commission against the assessor of the City and County of Denver for the purpose of requiring said assessor to add to his assessment roll the forty per cent increase heretofore mentioned, and, by stipulation of the parties in this cause, it was agreed that the issues involved in the injunction case should be determined by the Supreme Court of the state on the briefs and arguments had in the mandamus case.

The same questions of law were involved in the injunction case before the Supreme Court as in the mandamus case, except the question of adequate remedy at law. This question of adequate remedy at law, while properly raised by the pleadings in the injunction case, was not raised or considered by the Supreme Court of the state, for the reason that it could not properly have been considered in the mandamus suit. However, in this case, the court not being limited to the grounds assigned by the Supreme Court of the state, and being at liberty to affirm the decision of said court, if there is any ground justifying such affirmance, we will discuss this question of adequate remedy at law.

CONSTITUTIONAL PROVISIONS.

We will not set out at length the various constitutional provisions appropriate to be considered in connection with our argument, but will only make brief references to them.

The Fourteenth Amendment to the Constitution of the United States provides, inter alia:

> "No state shall * * * deprive any person of life, liberty or property without due process of law."

The Constitution of the State of Colorado contains the following provisions:

Article II, section 25:

> "That no person shall be deprived of life, liberty or property, without due process of law."

Article X, section 2:

> "The General Assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the State government for each fiscal year."

Article X, section 3:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal."

Article X, section 11:

> "The rate of taxation on property for state purposes shall never exceed four mills on each dollar of valuation."

Article X, section 15, of the State Constitution provides for a State Board of Equalization, whose duty is to adjust and equalize the valuation of real and personal property among the several counties of the state.

Sections 3, 5, 6 and 8 of Article XI of the State Constitution provide for certain limitations of indebtedness.

STATUTORY PROVISIONS.

The statutory provisions in relation to revenue, were codified at a special session of the legislature in 1902, and reference herein to said statutes will be to the Revised Statutes of 1908 by general sections:

Section 5529:

> "All taxable property shall be listed and valued each year and shall be assessed at its full cash value; land to be listed and valued separate and apart from the personal property and improvements thereon."

Section 5614 provides that—

> "no irregularity, error or omission in the assessment of any property or in the levy of any tax, shall in any manner affect the legality of any tax levied upon such property," etc.

Section 5639 provides that an aggrieved taxpayer may appear before the assessor and make known

to the assessor the facts in the premises; also provides that the assessor shall, prior to the first Tuesday in August, mail to each person, the valuation of whose property has been raised, a statement of such change, giving the taxpayers an opportunity to have their grievances heard before him.

Section 5640 provides that where the amount of the valuation exceeds $7,500 the objection by the taxpayer shall be made in writing, and, if the same is overruled, the taxpayer may appeal to the District or County Court.

Section 5641 provides that when the valuation does not exceed $7,500 the objections are to be in writing, and the taxpayer, if the objections are overruled, may appeal to the board of county commissioners, and, if not satisfied with the ruling of the board of county commissioners, the taxpayer may appeal to the District Court.

Section 5658 provides that the assessor shall on the first day of the meeting of the county board of equalization (the same being the first Tuesday in September), submit the complete assessment of his county, etc.

Section 5761 provides the time of the meeting of the county board of equalization; provides that the first meeting shall be held on the first Tuesday in September, and shall continue not less than three nor more than ten consecutive days, and the second meeting on the third Tuesday of September, which shall continue not less than two nor more than ten consecutive days; and provides that an extension of the time of either meeting may be had, but in no case to exceed ten days.

Section 5764 provides:

> "The State Board of Equalization shall sit on the first Monday of October in each year at the executive office, for the purpose of examining and adjusting and equalizing the assessment in the several counties of the state."

Section 5767 provides that the State Board of Equalization shall, on or before the third Monday of October, complete its equalization, and that the State Auditor shall transmit to the clerk of each county a statement of the change, if any, which has been made in the assessment, and the rate of the tax to be levied.

Chapter 216 of the session laws of 1911 created the Colorado Tax Commission and defined the duties of the commission.

Section 13 of the act gives the commission general supervision over the administration of, and authority to enforce, all laws for the assessment, levying, and collection of taxes; the right to re-appraise property in the various counties of the state, and to require county assessors to place upon the assessment roll any property which may be found to have, for any reason, escaped assessment and taxation.

Sections 15 and 36 of the act authorizes the commission to institute and maintain actions for the enforcement of the taxing laws, and section 45 confers upon the commission all rights of a taxpayer for the purpose of maintaining actions.

The following sections, from 30 to 33, inclusive, refer to the method of equalizing all taxes as between the counties.

"Section 30. Abstract of County Assessor. What Abstract shall contain. Each County Assessor, on or before the first Monday of September, 1911, and every year thereafter, shall make and transmit to the Commission an abstract of the real and personal property of his county in which he shall set forth the value thereof with such additions as have been made thereto.

Section 31. Duty of the Commission. The Commission shall, on or before the first day of October following, determine whether the real and personal property of the several counties in the State shall have been assessed at its true and full cash value, and, if in the opinion of the said Commission the real or personal property within any county in the State as reported by said County Assessor to the said Commission is not on the assessment roll at its true and full cash value, the said Commission shall determine the increase or decrease in the valuation in such County by such rate per cent. or such amount as will place said property on the assessment roll at its true and full cash value.

Section 32. Statement to the State Board of Equalization. When the Commission has determined the true value of the real and personal property in the several counties, the Commission shall transmit to the State Board of Equalization a statement of the amount to be added to or deducted

from the valuation of the real and personal property of each county, specifying the amount to be added to or to be deducted from the valuation of the real or personal property.

Section 33. Duty of State Board of Equalization. It shall be the duty of the State Board of Equalization to examine the abstracts of assessment as submitted by the State Tax Commission and the State Board of Equalization shall forthwith examine the abstract of assessment of each county as submitted by the State Tax Commission and make a record of its action on the abstract of each county and certify the same to the County Assessor, and the County Assessor shall forthwith add to or deduct from each tract or lot, and its improvements, of real property and all personal property in his county, the required per cent. or amount on the valuation thereof as it stands after it has been equalized by the State Board of Equalization, adding or deducting in each case any sum less than five dollars so that the value of any separate tract or lot and its improvements shall be ten dollars or some multiple thereof."

SESSION LAWS OF 1913.

Section 1, page 525, amends section 40 of the laws of 1911 by adding to the powers of the Tax Com-

mission the power of assessing all public-utility corporations.

Section 3, page 535, provides that, on or before September 1 in each year, the assessor shall make in duplicate a true abstract of his assessment roll, one copy of which shall be transmitted to the State Tax Commission. This is practically a re-enactment of Section 30, Chapter 216, of the laws of 1911.

Chapter 137 provides for limiting the levy of taxes in the several taxing districts of the state, including counties, towns, and cities, and the levy for state purposes.

BRIEF OF THE ARGUMENT.

I.

It is acknowledged that the right to tax is a sovereign power, and that the power of the legislature in adopting laws for taxation and the procedure therefor is plenary, limited only by the express inhibitions of national and state constitutions.

> "The conflict between a legislative act and some specific provision of the fundamental law must in general be clearly proven, or the act will not be deemed unconstitutional."
>
> "That a statute may in the opinion of the court be against the spirit of the consti-

tution or against the policy of the government, is not sufficient to warrant the court in declaring it unconstitutional."

"The courts cannot arrest unwise or oppressive acts of legislation so long as such acts are within constitutional bounds."

Cooley on Constitutional Lim. (6th ed.), Chap. 7.

"In passing upon the acts of a co-ordinate department of government, courts always shrink from the exercise of their unquestioned power to declare such acts in violation of the fundamental law, and enter upon such consideration with reluctance and hesitation. In all cases of doubt, the presumption in favor of the constitutionality of an act is indulged."

Newman vs. People, 23 Colo., 306.

"Before proceedings for the collection of taxes sanctioned by the Supreme Court of the state are stricken down in this court, it must clearly appear that some one of the fundamental guarantees of right contained in the Federal Constitution has been invaded."

Bellingham Bay etc. Co. vs. New Whatcom, 172 U. S., 320.

With these principles of construction in mind let us consider what the plain provisions of the Colorado statutes in relation to revenue are.

In the first place, the county assessor proceeds to place a valuation upon the property of his county, and in doing this he acts judicially, or at least quasi-judicially, in determining the valuation, subject, however, to certain limitations and supervisory control. The law enjoins upon him the duty of appraising property at its full cash value, and the Tax Commission may require of him, by proper legal remedies, that this duty which the law enjoins be performed, or the Tax Commission may re-appraise or re-assess the property itself. After the assessor has completed his assessment and returned his assessment roll, as the law provides, to the county board of equalization, that board has the power to equalize the valuations as fixed by the assessor, to add omitted property and to correct errors, and to require of the assessor that the assessment roll be modified or changed in accordance with its action.

The action taken by the county board is final and controlling, so far as the assessor is concerned, and no appeal or review is provided by statute from its action, so far as the assessor is concerned.

The next step to be taken in the process of taxation is the action provided by the Session Laws of 1911, chapter 216, sections 30, 31 and 32, to be taken by the Tax Commission. It is made the duty of this board, after receiving the abstracts from the assessors of the state, to determine whether the real and personal property of the several counties shall have been assessed at its true and full cash value, and to determine the rate per cent necessary to be added or deducted to place the property on the assessment rolls at its true and full cash value. After the Tax

Commission has done this, it shall transmit its statement to the State Board of Equalization, together with the abstracts of the various assessors, and it then becomes the duty of the State Board of Equalization to examine these abstracts of assessment and to take action for the purpose of equalizing the valuation of the counties in accordance with the provisions of the law; and, after having taken its action, the State Board of Equalization certifies to the various assessors the amount of increase or decrease to be added to or deducted from the real and personal property of their respective counties.

The laws contemplate that this action on the part of the State Board of Equalization shall be completed by the third Monday in October. When this action has been taken and completed by the State Board of Equalization, the valuation of the real and personal property of the State is complete, and nothing remains to be done except the purely ministerial duties on the part of the county taxing officers in correcting the assessment roll to comply with the orders made by the State Board of Equalization. The action of the State Board of Equalization is final and conclusive, so far as the taxing officers are concerned.

A careful analysis of the taxing system of the state as contained in the Constitution and statutes, shows a careful and well-developed plan of taxation, and especially when we bear in mind the well-recognized rule that all methods of assessment are "more or less imperfect," and that the best that can be expected in any method or system of taxation is "approximate equality."

In showing the purpose of the legislature of the State in adopting chapter 216 of the Session Laws of 1911, creating a central body, we excerpt from the opinion of Mr. Justice White in the case of Colorado Tax Commission vs. Pitcher, 56 Colo., 376:

> "Any one familiar with the history of taxation in this state can readily realize the purpose and necessity of the legislature enacting chapter 216 of the Session Laws of 1911. All the statutes adopted previous to this law, had proven inadequate to coerce the assessors to fix a full cash value, as required by law, upon the taxable property within the county. Moreover, they had likewise failed to place a relatively equal value upon the same class of property within their respective counties, and county commissioners and boards of equalization had not corrected the evil. It, no doubt, became apparent to the general assembly that the assessment of property could not be entrusted solely to the local assessors and local boards, for the reason that such officials continually assessed property far below its real value, justifying their acts in that respect on the assertion that other counties did likewise. Indeed, history discloses that such has been the experience of many of the states of the Union, and imperative necessity, there as here, has required the creation of central bodies with power to correct assessment rolls, and increase or lower the valuations placed upon property for taxation purposes by the local authorities.

It also became apparent to the legislature, no doubt, that in order to enable the state to secure sufficient revenue to carry on its functions of government, and to support its public institutions, a new method must be adopted; a method which would not only secure a just valuation as between the taxpayers of the state, but also a valuation that would be just to the state itself. Accordingly, it became manifest that full cash value is the only standard that is just and uniform, and whereby each citizen can be required to contribute to the support of government according to the value of his property. For, so long as the prevailing practice of assessing property in different localities at figures varying from twenty-five to one hundred per cent of its cash value, there will be gross inequalities in distribution of the tax burden."

II.

ADEQUATE REMEDY AT LAW.

Even though it should be conceded that the plaintiff in error was denied by the Statutes of Colorado due process of law, still it would not have been entitled to judgment unless it had further shown that it had brought itself within some of the recognized heads of equity jurisprudence.

Section 5750 of the Revised Statutes of Colorado of 1908, provides:

"Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are entitled to be unavailable, double or erroneous assessments, as provided in this act, and *in all cases where any person shall pay any tax, interest or cost, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.*" (Italics ours.)

Our contention is that the foregoing statute affords the plaintiff in error an adequate remedy at law, and that before it can be heard to complain it should have exhausted this remedy at law.

This statute has been construed by the Supreme Court of the State of Colorado and held to be adequate.

Hallett vs. Arapahoe County, 40 Colo., 303.

Insurance Company vs. Bonner, 7 Colo. App., 97.

Bent County vs. Santa Fe Ry. Co., 52 Colo., 609.

See Cooley on Taxation, page 760.

The case of Singer Sewing Machine Company vs. Benedict, 229 U. S., 481, a case appealed from the

Circuit Court of Appeals for the Eighth Circuit, was a case in which it was contended that the action of the assessor in the City and County of Denver, in adding personal property to the company's schedule, without having given the company notice of said additional assessment, denied the taxpayer the guaranty of the provisions of the Constitution of the United States. The District Court dismissed the bill and the Circuit Court of Appeals affirmed the decree on the ground that an adequate remedy at law was provided by the Colorado Statute above referred to. This court, in passing upon the question, in the opinion by Mr. Justice Van Devanter, says, at pp. 485-487:

> "In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may he had at law. The statute so declares, Rev. Stat., Sec. 723, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*. *Reynes v. Dumont*, 130 U. S. 354, 395; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658."
>
> * * * * * * * * *
>
> "It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the ag-

grieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity.

"A statute of Colorado enacted in 1870 (Laws 1870, p. 123, Sec. 106) and embodied in subsequent revenue acts (2 Mills' Ann. Stat., Sec. 3777; Laws 1902, c. 3, pp. 43, 146, Sec. 202; Rev. Stat. 1908, Sec. 5750) declares that 'in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.' This statute imposes upon the county commissioners the duty of refunding, without abatement or discount, taxes which have been paid and are found to be illegal, and confers upon the taxpayer a correlative right to enforce that duty by an action at law. As long ago as 1879 the Supreme Court of the State, in holding that the invalidity of a tax afforded no ground for enjoining its enforcement, said of this statute: 'Against an illegal tax complainant has a full and adequate remedy at law, and we see no reason why in this case he should not be remitted to that remedy.' *Price v. Kramer*, 4 Colorado, 546, 555. And again: 'The statute furnishes another remedy in such cases which is com-

plete and adequate.' *Woodward v. Ellsworth*, Id. 580, 581. And that this view of the statute still prevails is shown in *Hallett v. Arapahoe County*, 40 Colorado, 308, 318, decided in 1907, where in refusing equitable relief against the collection of taxes alleged to be illegal, the court said (p. 319): 'By Sec. 3777, 2 Mills' Ann. Stat., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate.'

We refer to these cases, not as defining the jurisdiction in equity of the Circuit Court, for that they could not do (*Payne v. Hook*, 7 Wall. 425, 430; *Whitehead v. Shattuck*, 138 U.S. 146; *Smythe v. Ames*, 169 U.S. 466, 516), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the Circuit Court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. *Ex parte McNiel*, 13 Wall. 236, 243; *United States Mining Co. v. Lawson*, 134 Fed. Rep. 769, 771. Thus it will be perceived that, if the taxes

in question were illegal and void, as asserted, the company had a remedy at law. It could pay them and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. *Dows v. Chicago*, 11 Wall. 108, 112; *State Railroad Tax Cases*, 92 U. S. 575, 613-614; *Shelton v. Platt*, 139 U. S. 591, 597; *Allen v. Pullman's Palace Car Co.*, Id. 658, 661; *Indiana Manufacturing Co. v. Koehne*, 188 U. S. 681, 686."

In the State Railroad Tax Cases, 92 U. S., 575, the court, at page 613, et seq., says:

"It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity. *Moores v. Smedley*, 6 Johns. Ch. 27; *Dodd v. Hartford*, 26 Conn. 239; *Green v. Munford*, 5 R. I. 478; *Messert v. Supervisors of Columbia*, 50 Barb. 190; *Dow v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 548.

The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by

the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. *But there is no place in this system for an application to a court of justice until after the money is paid.* (Italics ours.)

That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. See *Cheatham v. Norvell*, decided at this term; *Nickoll*

v. United States, 7 Wall. 122; *Dow v. Chicago,* 11 Wall 108.

* * * * * *

No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the constitution violated. If there is an excessive estimate of the value of the franchise or capital stock, or both, it is by an error of judgment in the officers to whose judgment the law confided that matter; and it does not lie with the court to substitute its own judgment for that of the tribunal expressly created for that purpose.

* * * * * *

It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really con-

tested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases."

This same section 5750 of the Revised Statutes of Colorado, 1908, was interpreted in the case of Union Pacific Railroad Company vs. Board of County Commissioners of Weld County, 133 C. C. A., 392, and there held to afford an adequate remedy at law. The court, in referring to the statute, among other things, has this to say:

"It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer, and, from considerations *of the highest public policy, abolishes the right to stay the collection of public revenues by injunction.* The courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away. The statute being constitutional, the judgment of the legislature on that subject must control."

As we have explained in the statement of the case made at the outset of this brief, the reason that the

question of adequate remedy at law was not decided by the Supreme Court of the state and the fact that the case was decided on other grounds, does not eliminate the question of adequate remedy at law in this court. As said in the Singer case above quoted from,

> "If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte.*"

It is obvious here that the plaintiff in error has an adequate remedy at law. The remedy is specified by the statute.

It was said by this court in the case of Walter A. Wood Etc. Co. vs. Skinner, 139 U. S., 293:

> "It is well settled by a long series of adjudications that, to give this court jurisdiction by writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U. S. 216 (32:125)."

See also:

Eustis vs. Bolles, 150 U. S., 361.

State vs. Louisiana, 8 Otto., 140.

Cook County vs. Canal Co., 138 U. S., 635, 651.

Johnson vs. Risk, 137 U. S., 300.
Klinger vs. State of Missouri, 13 Wall., 257.

III.

DUE PROCESS OF LAW.

In determining what is meant by due process of law, a marked distinction is recognized in cases involving general taxes, from cases involving other subject matter, the authorities and decisions holding that matters involving general taxes should be given a most liberal construction.

This court has said in the case of Turpin vs. Lemon, 187 U. S., 51:

> "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. * * * *But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no*

notice whatever is necessary." (Italics ours.)

"The payment of taxes must frequently be enforced against a reluctant and adverse sentiment which would gladly avail itself of every opportunity to postpone collection, while the necessities of the government for revenue may not admit of the delays incident to the formal proceedings of a suit in court. From time immemorial these conditions have been recognized, and the most summary methods of seizure and sale for the satisfaction of taxes and public dues have been authorized, and being recognized universally in England and in this country, they have been held to constitute due process of law."

McGehee on Due Process of Law, p. 232.

"As has been well said, 'the mode of levying as well as the right of imposing taxes is completely and exclusively within the legislative power, which, it is to be presumed, will always be exercised with an equal regard to the security of the public and individual rights and convenience. The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in

such mode and proportion as the legislative will shall direct; and if the officers intrusted with the execution of the laws transcend their powers to the injury of an individual, the common law entitles him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct, the collection of the revenue.' There is no room for the supposition that in a matter of this public importance, where promptness in collection is always desirable, and often imperative, dilatory proceedings of this nature were within the contemplation of the people when consenting to any general provision of the constitution. It is safer, and, as we believe, more correct, to say that our constitutions have been framed and agreed upon in view of an immemorial practice and rule of government, under which the whole subject has been intrusted to the legislative department; and they are to be understood and construed in the light of that practice wherever the people have not expressly undertaken to change it."

Cooley on Taxation (3d ed.), 53-55.

County boards of equalization, as well as state boards of equalization, have the right to raise or lower the assessed valuation of all property within a particular district or county without notice to each or any owner of such property.

State vs. Armstrong, 56 Pac. (Utah), 1076, 1079.

Territory vs. First National Bank, 65 Pac. (N. M.), 172.

"The nation from whom we inherit the phrase, due process of law, has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it, the statute under consideration does not violate it."

McMillan vs. Anderson, 95 U. S., 41.

Mr. Justice Field, in the case of Hagar vs. Reclamation District, 111 U. S., 701, in defining what is meant by "due process of law" says:

"What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller in *Davidson v. New Orleans*, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' 96 U. S. 97, 104. It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected."

It was said in the case of Kelly vs. Pittsburgh, 104 U. S., 79:

> "It is not asserted that in the methods by which the value of his land was ascertained for the purpose of this taxation there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country, since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been, due process of law."
>
> "It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that 'due process of law,' as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held

sufficient. 'In judging what is "due process of law,"' said Mr. Justice Bradley, in Davidson v. New Orleans, 96 U. S. 97, 107, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law."'"

See also Pittsburg etc. Ry. Co. vs. Backus, 154 U. S., 425.

The case on this subject most frequently referred to is the State Railway Tax Cases, 92 U. S., 575, wherein Mr. Justice Miller, rendering the opinion of the court, says, at page 609:

"The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such

notice, surely every individual is equally entitled to it. Yet, if this be so, the expense of giving notice, the delay of hearing such individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

In Suydam vs. Merrick Co., 19 Nebr., 155; 27 N. W., 142, Mr. Justice Cobb, speaking for the court, said:

"When complaint is made that a certain individual is assessed too low, then it is a condition precedent to action thereon by the board that such individual owner have notice of such proceeding. But the increase of the assessment of a precinct is not made upon any one's complaint, but arises in the official mind and judgment of the commissioners, upon an inspection and comparison of the assessment rolls of the several precincts. The law has designated no officer or person upon whom notice could be served, or to represent the precinct at such equalization. The county commis-

sioners themselves are the only and proper representatives of the precinct, and, as they constitute the board of equalization, no notice need be served on them."

In a recent case decided in Oklahoma, Carrico et al. vs. Crocker et al., 133 Pac., 183, the identical question here involved was considered. It was there held by the court that every taxpayer had the most ample opportunity of being heard before the township board and before the county equalization board, and held that it would be presumed that the taxpayers owning property in the township, and who did not appeal, were satisfied with the action of the board and that in contemplation of law the taxpayer was before the board and acquiesced in the assessment, and that the same rule obtains in reference tc the county boards of equalization, and that when the property of the county was submitted for action to the county board of equalization, the presumption conclusively obtained that it had all been assessed on a uniform basis, and that when the state board of equalization had acted, in the absence of evidence of fraud or gross error in the system on which the valuations were made, its judgment was final.

The same argument is tenable here. The statutes of the State of Colorado afforded each taxpayer ample opportunity to be heard in order that his property should be uniformly taxed with other property in his county. He had the opportunity of appearing not only before the Colorado Tax Commission, but before the State Equalization Board. The time of meeting of the State Equalization Board is fixed by law. Its meetings are public.

The time of meeting of the Colorado Tax Commission is fixed by law. It is provided by section 9 of chapter 216 of the Session Laws of Colorado of 1911 that the commission shall be in continuous session, and that all hearings shall be open to the public, and by sections 30 and 31 of the chapter, the time is provided that the commission shall have under consideration the question of determining the increase or decrease in the valuation of the counties, and in so far as these central bodies are concerned, and in so far as the action taken by them is concerned, with reference to adjusting and equalizing the valuations of the counties, nothing more is required in order to guarantee to the taxpayer due process of law.

We have examined carefully the decisions cited by counsel for plaintiff in error in his brief and find nothing in any of them controverting the decisions we have cited or the argument we have made with reference to this question of due process.

Counsel for plaintiff in error, in concluding his argument, assumes that this raise of forty per cent in the City and County of Denver made by the Colorado Tax Commission and the State Board of Equalization, was a reassessment of the property of all of the taxpayers of the City and County of Denver. This is not a correct assumption. It has been recognized time and again, and, as we have heretofore pointed out, that when boards of equalization meet to adjust and equalize assessments, they are not exercising the powers of original assessment and that no notice, other than that the statute affords, is necessary.

We could multiply without limit the decisions of courts throughout the United States upholding this

principle, but this court, having so frequently passed on the same subject, we have felt content with citing a few illustrative leading cases.

The fact that the increase was large does not change the principle. As shown herein, this increase was brought about by legislation in the state endeavoring to bring property up to its full cash value, but whether the increase as made by the central bodies is five per cent or one hundred per cent, the principle is not changed.

Neither does counsel's illustration of a man with one thousand dollars in money being compelled to pay taxes on fourteen hundred dollars, serve to fortify him in his argument.

We are willing to concede that this horizontal raise of forty per cent might operate in some cases to cause an illegal assessment, but that is a purely statutory legal question that will be met by the courts in proper proceedings when such exigencies arise, and it is not to be presumed that when such cases do arise, proper relief will not be awarded.

Counsel also, in the concluding page of his brief, states that the people of Colorado, by their Constitution, have provided four mills on each dollar as a limitation of state taxation, and states that this provision of the Constitution of Colorado is rendered useless and meaningless if a tax commission or board of equalization can put upon the taxable property of the state any valuation which uncontrolled opinion may fix or determine. The presumption must obtain that they will carry out their duties and endeavor to bring all of the assessable property of the state to the standard fixed by law, viz., full cash value.

We might also say that if the assessors of the various counties of the state are to be uncontrolled in the fixing of valuations, that inasmuch as there is a four-mill limit of levy, the state might be prevented, by the action of the assessors of the state, in collecting sufficient revenues to maintain its government.

The Constitution of the State of Colorado provides for uniformity of taxation. It limits the levies that can be provided for by the legislature. The legislature has adopted a standard of values, that is, full cash value, and experience has shown, not only in this state, but in other states, that unless coerced in some manner, assessors are likely to be remiss in their duties.

It, therefore, has been deemed not only expedient but necessary to create central boards to aid in bringing about uniformity of taxation, not only for the benefit and security of the taxpayers, but for the benefit of the state.

In concluding this branch of the discussion we wish specially to call the court's attention to the case of Tax Commission vs. Pitcher, 56 Colo., 343, the case consolidated with this one for the purpose of trial in the Supreme Court of the State of Colorado, and appearing in the record herein. In that case the court recognized the action of The Colorado Tax Commission in making the increase of forty per cent on the property in the City and County of Denver as an act of equalization and held that under the Constitution of the State of Colorado the aggregate valuation of the property of the state might be increased or decreased and upheld the power of The Colorado Tax Commission given it by statute.

IV.

CONCLUSION.

We respectfully submit that the Supreme Court of the state should be affirmed.

Respectfully submitted,

FRED FARRAR,
Attorney General of Colorado;

NORTON MONTGOMERY,
Assistant Attorney General of Colorado;

Attorneys for the State Board of Equalization and The Colorado Tax Commission, Defendants in Error.